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Supreme Court of the United States

OCTOBER TERM, 1948

No. 267

WILLIAM FARRELL, PETITIONER,

vs.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1948.

CERTIORARI GRANTED NOVEMBER 22, 1948.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Caption (omitted in printing)	1	
Statement under Rule XV (omitted in printing)	2	
Order granting leave to appeal on typewritten record and briefs (omitted in printing)	4	
Record from U. S. D. C., Southern District of New York	5	1
Libel	5	1
Answer	18	7
Libellant's interrogatories (omitted in printing)	25	
Respondent's answer to interrogatories (omitted in printing)	28	
Respondents' answer to interrogatories (omitted in printing)	28	
Libellant's demand for admission of facts (omitted in printing)	30	
Respondents' admission of facts (omitted in printing)	32	
Reporter's transcript of trial proceedings (omitted in printing)	34	
Opinion of the Court, Bright, J.	235	10
Findings of fact and conclusions of law	256	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 15, 1948.

—9896

		Original	Print
Record from U. S. D. C., Southern District of New York—Continued			
Final decree		269	34
Notice of appeal	(omitted in printing)	271	
Assignment of errors	(omitted in printing)	272	
Stipulation re exhibits	(omitted in printing)	277	
Stipulation as to record	(omitted in printing)	278	
Order extending time to file record on appeal (omitted in printing)		276	
Clerk's certificate	(omitted in printing)	279	
Opinion, Chase, J.		280	36
Judgment		290	43
Appellant's petition for rehearing	(omitted in printing)	292	
Denial of petition for rehearing	(omitted in printing)	295	
Order denying petition for rehearing (omitted in printing)		296	
Clerk's certificate	(omitted in printing)	298	
Order allowing certiorari		299	44
Stipulation as to printing of record		300	44

[fols. 1-5]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Admiralty 140-183

WILLIAM FARRELL, Libelant,

against

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, North Atlantic and Gulf Steamship Company, Inc., Luckenbach Steamship Company, Inc., Respondents

SUPPLEMENTED AND AMENDED LIBEL

To the Honorable Judges of the United States District Court for the Southern District of New York:

Seamen's Action

Libel Under Special Rule for Seamen to Sue Without Security or Prepayment of Fees for the Enforcement of the Laws of the United States, Common and Statutory for Protection of and for the Health and Safety of Seamen at Sea.

Supplemental libel of William Farrell, in accordance with the Order of Mr. Judge Albert L. Watson, U. S. D. J. for the Middle District of Pennsylvania, dated August 12, 1946, and consolidated with libel in the Southern District of New York by his order dated August 20, 1946, for trial in a cause of action, civil and maritime, against the respondents herein, under the provisions of the Suits in Admiralty Act of March 9, 1920, and pursuant to the provisions of Title 50 U. S. C. A., Section 1291, permitting the filing of a libel in personam for recovery of wages, maintenance and cure and damages for personal injuries.

The libelant, by G. Lester W. Curry, his proctor, complaining of the respondents, alleges as follows:

First: That at all times hereinafter mentioned the respondent, United States of America, was and is a corporate [fol. 6] sovereign, which has by law consented to be sued.

Second: Upon information and belief, that at all the times hereinafter mentioned, the respondent, War Shipping

Administration, was and is a governmental agency created by law and established for the purpose, among other things, of purchasing and operating vessels for and on behalf of the respondent, United States of America.

. . . . . .

[fols. 7-8] Seventh: That at the times hereinafter mentioned, the libelant was and still is a citizen and a resident of the United States, residing in the Borough of Avoca, State of Pennsylvania.

. . . . . .

[fol. 9] For a Second Cause of Action

Eighteenth: The libelant herein, repeats and realleges as a part of this cause of action, all of the allegations contained in Paragraphs numbered "First", "Second" and "Seventh" of the first cause of action, with the same force and effect as if they were herein specifically set forth.

Nineteenth: Upon information and belief, that at all times hereinafter mentioned, the respondent, Luckenbach Steamship Company, Incorporated, was and still is a Corporation duly organized and existing in accordance with law, with an office and place of business in the Borough of Manhattan, City, County and State of New York, and within the Southern District of New York.

Twentieth: Upon information and belief, that at all times hereinafter mentioned, the respondents, United States of America and the War Shipping Administration, owned, operated and controlled a certain vessel, the S/S "James E. Haviland", which is now in or about to come within the jurisdiction of the United States of America and this Honorable Court.

Twenty-first: Upon information and belief, that at all times hereinafter mentioned, the said S/S "James E. Haviland" was documented and registered in the name of the United States of America and the War Shipping Administration and was operated for and on behalf of the United States of America and the War Shipping Administration by the respondent, Luckenbach Steamship Company, Incorporated.

Twenty-second: Upon information and belief, that at all times hereinafter mentioned, the said S/S "James E.

HAVILAND" was flying the American Flag and was of American Registry and engaged as a merchant vessel.

[fol. 10] Twenty-third: Upon information and belief, that at all times hereinafter mentioned, the libelant was employed by the respondents aboard the aforesaid vessel as Oiler, and in the service of the said Vessel, having signed regular merchant shipping articles for the voyage aboard the said vessel, at Naples, Italy, in the capacity of Oiler, at a stipulated rate of wages per month and found.

Twenty-fourth: Upon information and belief, that on or about February 1, 1944, and for some time thereafter the S/S "JAMES E. HAVILAND" was lying in navigable waters at a dock at Palermo, Sicily; that said dock was worn, torn and strewn with debris and otherwise badly out of repair, and said dock was the sole means of access to and egress from the aforesaid vessel to the adjoining street.

Twenty-fourth-A: Upon information and belief, that at all times hereinafter mentioned the aforesaid dock and the Port of Palermo, Sicily, were occupied, operated and controlled by respondent, United States of America.

Twenty-fifth: Upon information and belief, that at all times herein mentioned, the aforesaid vessel was being operated under strict wartime measures, dangerously close to enemy occupied territory and within easy range of enemy aircraft and submarines.

Twenty-sixth: Upon information and belief, that the respondents herein with knowledge and notice of the aforesaid conditions and the dangerous condition of the aforesaid dock did, on or about February 5, 1944, issue to the libelant herein a pass or leave to go ashore, and did negligently, recklessly and carelessly permit and allow the libelant to be ashore.

[fol. 11] Twenty-Seventh: Upon information and belief, that on or about February 5, 1944, libelant went ashore and as he was returning to the said vessel to resume his employment aboard the S/S "James E. Haviland" and while he was on the dock to which the aforesaid vessel was tied, he was suddenly and without any fault on his part caused to fall and was precipitated down into an unprotected dry dock, which dry dock was attached to and became part of the aforesaid dock to which the aforesaid vessel was tied;

that libelant fell a great distance and landed on the solid concrete botton of the aforesaid dry dock, thereby sustaining very serious and permanent personal injuries. That prior to the occurrence of the accident the libelant had been duly admitted on the said dock and premises and had presented himself and his pass to a Military Police guarding the entrance to the said dock, and had passed through the entrance and onto the dock and that it was necessary for libelant to walk over said dock and premises in order to reach the ship and resume his employment.

Twenty-Seventh—A: Upon information and belief, that at all times herein mentioned the aforesaid dry dock was without water and was owned, operated and controlled by respondent, United States of America.

Twenty-Seventh—B: Upon information and belief, that at all times herein mentioned the aforesaid dry dock was occupied by a Naval Vessel owned, operated and controlled by respondent, United States of America.

Twenty-Eighth: That solely by reason of the respondents' said negligence, recklessness and carelessness as aforesaid, the libelant was injured, externally and internally and permanently, has suffered, is suffering and will very probably suffer great pain, agony and mental anguish for the [fol. 12] remainder of his life, has been rendered totally blind, has been and will be prevented from attending to his work for the rest of his life, has lost and will lose sums of money which he otherwise would have earned, has been obliged to undergo serious operations, has received and is still receiving medical treatment and attention, was and is compelled to pay out large sums to repatriate himself, for travel expense for himself and attendant to and from hospitals, and the libelant has been permanently injured all to his damage in the sum of One Hundred Thousand Dollars ($100,000.00).

Twenty-Ninth: That on or about the 12th day of October, 1945, the claim of the libelant was duly submitted for allowance to the Luckenbach Steamship Company, Incorporated, in accordance with the rules and regulations governing claims for death of seamen and election of remedies under Public Law 17, 78th Congress, H. R. 133, a copy of which claim is annexed hereto and made part of this libel, upon which this action is founded.

Thirtieth: That the Luckenbach Steamship Company, Incorporated, failed to notify the libelant in writing of a determination upon his claim within sixty (60) days following the date of filing thereof and as provided in the rules and regulations stated aforesaid libelant's claim is presumed to have been administratively disallowed.

Thirty-First: That all and singular the foregoing matters are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court, and that they can be compelled to answer all and singular the matters aforesaid and that this Honorable Court would be pleased to decree the payment of your libelant's claim.

[fol. 13] For a Third Cause of Action

Thirty-Second: The libelant herein, repeats and realleges as a part of this cause of action, all of the allegations contained in Paragraphs numbered "First", "Second" and "Seventh" of the First Cause of Action and Paragraphs numbered "Nineteenth", "Twentieth", "Twenty-First", "Twenty-Second", "Twenty-Third", "Twenty-Ninth" and "Thirtieth" of the Second Cause of Action, with the same force and effect as if they were herein specifically set forth.

Thirty-Third: Upon information and belief, that on or about February 5, 1944, the S/S "James E. Haviland", was lying in the navigable waters at a dock at Palermo, Sicily; that on said date libelant was given leave to go ashore; that he went ashore and as he was returning to the said vessel to resume his employment aboard the said "James E. Haviland" and while he was on the dock, to which the aforesaid vessel was tied, he was suddenly and without any fault on his part caused to fall and was precipitated down into an unprotected dry dock which dry dock was attached to and became part of the aforesaid dock to which the aforesaid vessel was tied; that libelant fell a great distance and landed on the solid concrete bottom of the aforesaid dry dock, thereby sustaining very serious and permanent personal injuries. That prior to the occurrence of the accident the libelant had been duly admitted on the said dock and premises and had presented himself and his pass to a Military Police guarding the entrance to the said dock, and had passed through the entrance and

onto the dock and that it was necessary for libelant to walk over said dock and premises in order to reach the ship and resume his employment.

Thirty-Fourth: That by reason of the said personal [fol. 14] injuries libelant has been rendered sick, sore, lame and permanently disabled, has suffered, is suffering and will very probably suffer great pain, agony and mental anguish for the remainder of his life, has been rendered totally blind, has been and will be prevented from attending to his work for the rest of his life, has lost and will lose sums of money which he otherwise would have earned, has been obliged to undergo serious operations, has received and is still receiving medical treatment and attention, was and is compelled to pay out large sums to repatriate himself, for travel expense for himself and attendant to and from hospitals, and the libelant has been permanently injured all to his damage.

Thirty-Fifth: That by reason of the aforesaid and the resulting injuries libelant, under the general maritime law, is entitled to be maintained and cured, and to his wages to the end of the voyage.

Thirty-Sixth: That the libelant has spent and will be required to spend large sums of money for his maintenance, care and cure all to his damage in the sum of Fifty Thousand Dollars ($50,000.00).

Thirty-Seventh: That all and singular the foregoing matters are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court and that respondents can be compelled to answer all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of your libelant's claim.

Wherefore libelant prays that the respondents, and each of them, be required to appear and answer all and singularly the matters aforesaid, and that libelant may have a decree [fol. 15-17] for the amount of wages, maintenance and bonuses found due and owing in the First Cause of Action, for the amount of the damages in the Second Cause of Action, to wit, the sum of One Hundred Thousand Dollars ($100,000.00), and for maintenance and cure in the Third

Cause of Action, to wit, the sum of Fifty Thousand Dollars ($50,000.00).

G. Lester W. Curry, Proctor for Libelant, Office and P. O. Address, 70 Pine Street, New York 5, N. Y.

(Verified by Proctor on behalf of Libelant on December 26, 1945.)

[fol. 18] In United States District Court, Southern District of New York

(Same Title)

Answer

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of the United States of America to the supplemental libel and complaint of William Farrell filed herein pursuant to an order entered on August 12, 1946, in the United States District Court for the Middle District of Pennsylvania, in a cause of action alleged to be civil and maritime, alleges that War Shipping Administration, also named as a respondent, is not properly so named and is not subject to suit, and further alleges upon information and belief as follows:

As to the First Alleged Cause of Action

First. Respondent admits that it was and is a corporate sovereign which has by law consented to be sued but only in accordance with the statutes enacted for that purpose and except as so admitted, denies the allegations contained in the first article of the libel.

Second. Respondent denies the allegations contained in the second article of the libel except that it admits that War Shipping Administration was a governmental agency created by Executive Order to perform certain functions.

* * * * * * * * *

[fol. 19-20] Seventh. Respondent alleges that it is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in the seventh article of the libel.

. . . . . .

[fol. 21] As To the Second Alleged Cause of Action

Eighteenth. Respondent repeats the allegations hereinbefore set forth in the first, second and seventh articles as its answer to the allegations of the libel repleaded in the eighteenth article thereof.

Nineteenth. Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the nineteenth article of the libel.

Twentieth. Respondent denies the allegations contained in the twentieth article of the libel except that it admits that on the date mentioned in the twenty-seventh article of the libel respondent owned, operated and controlled the steamship James E. Haviland.

Twenty-first. Respondent denies the allegations contained in the twenty-first article of the libel except that it admits that on the date mentioned in the twenty-seventh article of the libel the steamship James E. Haviland was documented and registered in this respondent's name and was operated by it.

Twenty-second. Respondent denies the allegations contained in the twenty-second article of the libel except that it admits that on the date mentioned in the twenty-seventh article of the libel the steamship James E. Haviland wore the American flag and was of American registry.

Twenty-third. Respondent denies the allegations contained in the twenty-third article of the libel except that it admits that on the date mentioned in the twenty-seventh article of the libel libellant had been employed by it as a member of the crew of the steamship James E. Haviland [fol. 22] under shipping articles by him signed.

Twenty-fourth. Respondent denies the allegations contained in the twenty-fourth article of the libel except that it admits that on or about February 1, 1944 the steamship James E. Haviland lay at a dock at Palermo, Sicily.

Twenty-fourth (a). Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the twenty-fourth (a) article of the libel.

Twenty-fifth: Respondent admits the allegations contained in the twenty-fifth article of the libel.

Twenty-sixth. Respondent denies the allegations contained in the twenty-sixth article of the libel.

Twenty-seventh. Respondent denies the allegations contained in the twenty-seventh article of the libel.

Twenty-seventh (a). Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the twenty-seventh (a) article of the libel.

Twenty-seventh (b). Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the twenty-seventh (b) article of the libel.

Twenty-eighth. Respondent denies the allegations contained in the twenty-eighth article of the libel.

Twenty-ninth. Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the twenty-ninth article of the libel.

[fol. 23] Thirtieth. Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the thirtieth article of the libel.

Thirty-first. Respondent denies the allegations contained in the thirty-first article of the libel.

As to the Third Alleged Cause of Action

Thirty-second. Respondent repeats each and every allegation hereinbefore set forth in the first, second, seventh, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-ninth and thirtieth articles as its answer to the allega-

tions of the libel repleaded in the thirty-second article thereof.

Thirty-third. Respondent denies the allegations contained in the thirty-third article of the libel.

Thirty-fourth. Respondent denies the allegations contained in the thirty-fourth article of the libel.

Thirty-fifth. Respondent denies the allegations contained in the thirty-fifth article of the libel.

Thirty-sixth. Respondent denies the allegations contained in the thirty-sixth article of the libel.

Thirty-seventh. Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations as to the admiralty and maritime jurisdiction of this Court herein and denies the other allegations contained in the thirty-seventh article of the libel.

Thirty-eighth. Respondent alleges as a defense to the alleged second cause of action that libellant's injuries compained of, if any, were caused or contributed to by libellant's own negligence.

All and singular the premises are true.

[fols. 24-234] Wherefore, United States of America prays that the libel herein be dismissed as to it with costs.

Burlingham, Veeder, Clark & Hupper, Proctors for Respondent, United States of America.

(Verified by Chauncey I. Clark on behalf of Respondent on October 25, 1946.)

* * * * * * *

[fol. 235] In United States District Court, Southern District of New York

(Same Title)

Opinion—July 1, 1947.

Bright, D. J.

[fol. 236] Libellant, a seaman, brings this action to recover on three counts—(1) for wages, maintenance and

bonuses, (2) for personal injuries claimed to have been suffered by reason of the negligence of the respondents United States and Luckenbach Steamship Co., Inc., and (3) for maintenance and cure against the last named respondents. These claims will be considered in the order pleaded.

1

The facts proven as to this claim for wages are not in dispute. In November, 1942, libellant, then 22 years of age, enlisted in the Merchant Marine, and was sworn in as a member of the United States Navy. After a period of training and service upon another ship, on September 15, 1943, he signed on the S. S. "John Hopkins", as an oiler, for twelve months, to sail foreign, with base pay of $110. a month, plus war time bonuses. That voyage ended on March 25, 1944. The ship was a merchant vessel, owned and operated by the United States. When it arrived at Naples, Italy, libellant, on November 13, 1943, was granted a pass by the master to go ashore for medical treatment. He did so, and after examination and treatment by a doctor, returned to the ship on the same day. His ailment grew worse, and he applied on two subsequent days for a pass and was refused by a master. The master at the time had secret orders to sail, and felt that the difficulty from which libellant was suffering was not serious enough to delay sailing, and told libellant that he would soon be in another port at which time he could get treatment. Libellant, who was suffering from his ailment, was not satisfied with this, [fol. 237] and, contrary to the master's statement that no one was allowed ashore and that if he went ashore the responsibility would be his own, asked the pilot to take him ashore which was done. He saw a doctor and was sent to the hospital on November 16, 1943, where he remained until November 26, 1943. The vessel was ordered to sea on November 17, 1943, and as Farrell was absent without leave, he was logged as a deserter. The charge of desertion was subsequently withdrawn.

After discharge from the hospital, libellant was sent to the replacement pool for seamen in Naples, and was later assigned to the S. S. "James E. Haviland", another vessel owned and operated by the United States. He went aboard that vessel on December 15, and signed on on December 16,

1943, as an oiler, with the same pay and bonuses as on the "Hopkins".

At the time he left the "Hopkins" he had due him		$777.05
Against this were charges for advances, tax deductions, etc. of		407.07
Leaving a balance of		369.98
This money was brought back to this country and deposited with the clerk of this court. The vessel received a bill for board while Farrell was in Naples in the sum of	$36.00	
The charge in connection with the deposit of the money was	1.15	
In January 1945, Farrell was paid	250.00	
		287.15
And there is still held on the contingency that other bills might come forward		$ 82.83

No bills have been presented and the United States admits that libellant is entitled to this amount if his suit was timely brought.

[fol. 238] The Suits in Admiralty Act, under which this action is brought (46 U. S. C. A., section 745), provides that such an action must be brought "within two years after the cause of action arises". The libel here was filed on December 26, 1945. Libellant obviously terminated his employment on the "Hopkins" when he signed on the "Haviland" on December 16, 1945. If that was when his cause of action arose, his action was instituted ten days too late.

Public Law 17 of the 78th Congress (Title 50 U. S. C. A., section 1291(a)), provides that any claim for wages shall, if administratively disallowed in whole or in part, be enforced pursuant to the Provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel; and the words "administratively disallowed" are defined as a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. Libellant filed his claim on October 12, 1945. Under

General Order 32 of the War Shipping Administration, rules and regulations were promulgated which, so far as material, provided (304.23) that no action should be commenced unless such claim was filed and administratively disallowed; and (302.26) if the person or agency with whom the claim is filed failed to notify claimant in writing of a determination upon such claim within sixty days following the date of filing, the claim shall be presumed to have been administratively disallowed. There is no proof that the claim was disallowed other than by the lapse of time.

I think that by these regulations promulgated and enforced by an agent of the United States authorized by the [fol. 239] statute mentioned so to do, the two year statute of limitations in the Suits in Admiralty Act was tolled for the sixty days and that libellant's suit upon this claim was timely.

He is entitled, therefore, to recover from the respondent United States, the balance above mentioned, which is the amount due only to November 16, 1943, when libellant went ashore	$ 82.83
And in view of the fact that the charge of desertion has been withdrawn and he was in Naples without work and not repatriated until December 16, 1943, he would be entitled to one month's further pay of	110.00
And maintenance at $3.50 per day from November 26 to December 15	70.00
A total of	$262.83

This claim has been withdrawn by libellant as against the respondent North Atlantic & Gulf Steamship Company, and the libel as to it is dismissed.

2

This claim is to recover damages for personal injuries while libellant was a seaman on the S. S. "James E. Haviland", a cargo and troop ship. As stated above, he signed on that vessel at Naples on December 16, 1943. It arrived at Palermo on February 4, 1944. On February 5, 1944, libellant and others of the crew were given shore leave passes and they left the vessel some time after five o'clock in the evening while it was still daylight. They walked through

gate No. 5 near the dock, to which the vessel was moored, toward the main part of the town, which, as well as the dock area, had been badly bombed.

At that time, the entire harbor was in possession of the [fol. 240] United States Navy, and had been enclosed by walls and barbed wire, and each gate leading into the area was guarded by military police. The harbor was shaped somewhat like the letter C, and the pier at which the "Haviland" was moored, was about in the middle of the C. At the north end of the harbor, there was a dry dock built into the land. The area where it was located was also enclosed by a wall and wire fence. One of the witnesses stated that across the water the dry dock was about ¼ mile from where the "Haviland" was moored, and to get to it by land was about a mile. Maps introduced in evidence show that it was a considerable distance away from the pier and the only access to it was by the streets of Palermo in that vicinity. There was no path or street from the pier to the dry dock along the shore front. It was testified that this area was filled with debris from the bombing which the shore front had had and that no one could walk along this particular part of the shore front except by climbing over that debris.

Later in the evening, Farrell met one of the crew, and together they started for their vessel about eight o'clock from downtown Palermo. It was dark and raining. They inquired of an Italian policeman the way to gate 5, out of which they had come, but were wrongly directed and took the wrong route. They finally arrived at gate No. 1, which was one of the entrances to the area where the dry dock was located. They showed their shore leave passes, which revealed that they were seamen from the "Haviland", to the sentry and were admitted. After getting inside the gate, they started for what they thought was their ship, one walking on one side of the road and Farrell on the other, hoping that by that means they might get a ride back. The [fol. 241] other seaman and libellant were about 40 or 50 feet apart. The seaman, who was the only eye witness to the accident, testified he could see Farrell's figure but not clearly. He saw Farrell go over the rail on the other side of which was the dry dock. This seaman went over and held on to the rail, but saw no water, and when he saw what had happened, gave the alarm to the sentry. Farrell was

found at the bottom of the dry dock and was taken to the hospital by ambulance, where it was discovered that he had sustained a deep lacerated scalp wound and a severe fracture of the skull of such a nature that has caused double blindness, the optic nerve in both eyes being atrophied. He will be permanently blind. In addition to that, since his return to this country, he had four of five convulsions which, the testimony shows, comes from traumatic epilepsy, which will also be permanent and is a result of the skull fracture.

Libellant claims that the respondents United States and Luckenbach Steamship Company are liable, (1) because there was negligence on the part of the master of the "Haviland" in granting shore leave to libellant, an inexperienced seaman who had never been in the port of Palermo before, and because it was a dangerous port by reason of the bombings which it had sustained; (2) because they were negligent in permitting libellant to enter the dry dock area under the circumstances; and (3) because they were negligent in the maintenance of the dry dock, which was then being used by the United States Navy for the repair of its vessels, in that the same was not adequately lighted and was not protected by a proper fence or barricade.

[fol. 242] Except with reference to the question of lights and barricade in the dry dock area, there is no substantial contradiction in the testimony. The undisputed proof shows that libellant was lost through no fault of the respondenst, but wandered with his companion into the dry dock area where he had no right to be, more than half a mile from where his ship was docked and where the respondents could not be charged with any duty to protect him, not knowing or having reason to believe that he would be there on his return to the ship. He did not go back the way he left the ship and as his return was by a road over which the respondents could not be charged with notice that he would travel, they owed him no duty of reasonable care. *Hover* v. *Central R. Co. of N. J.*, 255 Fed. 493; *Krysiak* v. *Pennsylvania R. Co.*, 270 Fed. 758; *Sassaman* v. *Pennsylvania R. Co.*, 144 F(2) 950, 952.

I can see no merit in the claim that the master was negligent in granting a shore leave pass to the libellant under the circumstances. The work on the ship apparently was over for the day. It had docked safely the day before

and undoubtedly the crew were anxious to go ashore. They left the ship in broad daylight. There is evidence that the curfew imposed by the military authorities required their return by six o'clock. If there was such a regulation, that was violated. Certainly the master could not be said to have failed to exercise due care for the safety of libellant merely because he permitted him to go ashore. He certainly had the right to assume that libellant was competent and able to look out for himself, and would remain so while on shore, and the mere fact that he was given his liberty to do so, does not bespeak negligence.

[fol. 243] Libellant did not become lost through any fault of the master, nor could he be charged with notice that he might go astray. There was no duty on the part of the respondents to guard libellant, while engaged in purposes of his own, from dangers, if any, which could not reasonably be anticipated; certainly not from the danger of falling into this dry dock where he had no right to be, nor where it was reasonable to believe he ever would be. Shore leave is an essential part of the contract and life of a seaman as such. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 734.

Anderson v. *Lorentzen*, 160 F(2) 173; *Nowery* v. *Smith*, 69 F. Supply. 755; *Kyriakos* v. *Goulandris*, 151 Fed. 132; *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724; *Matter of Manville* v. *N. Y. State Dept. of Labor*, 294 N. Y. 1; *Marceau* v. *Great Lakes Transit Corp.*, 146 F(2) 416, cert. denied 324 U. S. 872; *Cudahy* v. *Parramore*, 263 U. S. 418; *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154; *Young* v. *N. H. & H. R. Co.*, 79 F.(2d) 844; *Matter of McInerney* v. *B. & S. R. R. Corp.*, 225 N. Y. 130; and *Heater* v. *Erie R. R. Co.*, 210 N. Y. App. Div. 497, are not in my judgment controlling. Those cases were concerned with ways customarly used by employees in going to or leaving their place of work, or ways which they were impliedly or expressly invited to use. In the Kyriakos case the master was charged with knowledge of the quarrelsome propensity of a seaman.

Nor can I see any negligence on the part of the sentry at gate 1. Libellant and his companion came to it and displayed their shore leave pass which had been issued to them by the military authorities. Even though the pass showed that they were seamen from the "Haviland", the sentry in admitting them would not be chargeable [fol. 244] under the facts here shown with any want of

reasonable care. I cannot and do not find that it was negligence so to do. But, assuming libellant was properly in the dry dock area and was entitled to the exercise of reasonable care, the evidence upon the subject of lights and barricades seems overwhelmingly against libellant's contention otherwise. Libellant, because of his injuries, has sustained a complete loss of memory of all of the events occurring to him for some time before the accident and for many weeks thereafter. His witness Furey, was a seaman from the U.S.S.S. "Plunkett," which had been seriously damaged by a direct bomb hit and had been in dry dock at some time preceding the accident. It had left the dry dock, however, on January 31, five days before the accident. He testified that there were stanchions or posts around the dock with pieces of chain running between them; and that in places one or two of the pipe stanchions were missing but in other places they had a chain running through them. He did not recall seeing any big flood lights around the dock. Repairs were being made on the deck, and work was going on the night which required lights in the area where the ship was being repaired. There were other occassional lights around. At night electric lights were lighted at each end of the gangway from the ship to the shore. When he returned to the ship at night, after shore leave, he had no trouble seeing the gangway.

Another witness called by libellant stated that after he heard of the accident to the libellant, he went to the dry dock, but the sentry would not admit him through the gate; that he got within 150 or 200 feet of the dry dock and did not see any fence around it, but saw people working [fol. 245] around it. The testimony of libellant's companion at the time of the accident has been referred to. While he testified that it was so dark he could scarcely distinguish libellant's shape 40 or 50 feet away, he saw Farrell go over the rail and when he went over to see what had become of him, he found a rail about belt high five feet from the roadway, and took hold of it. When he went back to the dock later, he saw a rail around the dock on one side but did not go around, so he could not describe whether it was all the way around. He says there were no lights in the town or on the dock.

Respondents called Tarallo, who was in the United States Army and stationed at the dry dock in question and in

charge of it. He was not at the dry dock when the accident happened, but was there shortly before and returned later in the evening. He testified that the stanchions around the dock itself were removable, so that they could be taken out when a ship was being put into dock, and were replaced when the ship was in position. The fence or barricade consisted of these removable stanchions which were sunk into holes in the dock between which was run a wire cable or chain 5/8 of an inch in diameter, and which extended all the way around the dock area except at the two ends. He also testified that lights were on some of the buildings around the area of the dry dock and there were other lights on the side of the dry dock. There were also lights on the top of the rigging loft, a building at one end of the area, and on the ends of the booms on the three cranes used in the repair work which went on with three shifts all of the 24 hours of the day. There were also lights on the pump house at the land end of the dock. [fol. 246] He stated further that on the night of February 5, 1944, when he made his inspection just before leaving between 5 and 6 o'clock, the stanchions were up and the flood lights were lighted around the dock area. At that time work was being done in salvaging parts from a subchaser, which was in the dry dock and the lights were required so that the work could be done, and they were flood lights around the edge of the dock directed toward the work. He was told when he returned that the accident had occurred and went over to the dock, and as far as he could see the life line was up and the flood lights burning.

Claffey, the senior patrol officer of the Navy in that area at the time of the accident, was also called and testified that he was responsible for the general security of the Allied forces in that vicinity. While the city was blacked out at the time, the dry dock area was kept lighted because work was going on 24 hours a day. During the months of January and February 1944, he saw the lights practically every night; the light was adequate and the reflection could be seen five miles away. He was not in the dock area on February 5th.

Nelson, another witness for respondents, was chief Quarter Master in the Armed Forces at Palermo at the time, and for some time before and after. He described the roads which would be taken from the town to the pier where the "Haviland" was docked, and to the dry dock.

There were no streets or roadways extending from one to the other and no regular means of communication between them along the shore front. The naval base area of the dry dock did not include the part where the "Haviland" [fol. 247] was tied up, although they were both within one enclosure.

At the time of the accident, the S. S. "Prevail" was in the dry dock undergoing repairs, as was also the sub-chaser for salvage purposes. Moore, who was deck officer on the "Prevail", was called as a witness and stated that he kept a log of the ship. He was in charge of the ship from February 5th at noon to noon of February 6th. The gangway from the ship to the shore had railings on both sides and from the shore end rope rigging ran to the stanchions on the dock and there were two lights on either end. There was a rail around the dry dock consisting of steel posts and two chains from post to post, about 3½ feet high, and this was all around the edge of the dock except at the water edge. He went around the edge of the dry dock and made an inspection about 7 o'clock or 7:45 in the evening. After dark they had four or six 200 watt lights down in the dock trained against the hull of the ship. The lights on shore surrounding the dock, although on a dim-out basis, were sufficient so one could see, and were turned on at sundown and burned all night. The work on the "Prevail" was going on all day and night. Right ahead of the "Prevail" in the dry dock was the sub-chaser and men were continuously working on that salvaging parts from it. They had lights erected all along the edge of the dock so that they could see to work and they were left on. He did not recall whether he saw them on the night of the 5th.

Captain Ragsdale, called as a witness for the respondent, testified that the shipyard and the dry dock was under his [fol. 248] immediate control. Palermo was captured by the Allied forces in July 1943, and work to get the dry dock in condition so that it could be used was immediately started. An area of 50 feet wide on either side of the dock was cleared off, a bomb crater at the head of the dock was filled in and repaired, batteries of lights were mounted on top of the buildings so that work on three shifts could be carried on. A string of lights was erected along the edge of the dock and lights were placed on each of the two traveling cranes and on the buildings at the intersection

of the streets in the latter part of August or the middle of September 1943. He submitted a diagram, Exhibit M, showing where the lights were located. One or two other lights were located on the water tower mentioned. The dock went into operation on December 1, 1943, and was used continuously twenty-four hours a day from then on until 1945. The "Prevail" was in the dock from February 2nd to February 8th, 1944, and the "Plunkett" from January 27th to January 31st, 1944. Around the dock there was a railing about 36 inches in height. It was put up immediately after a ship is docked and before the water is drawn from the dock. There are turnbuckles which permit the line from stanchion to stanchion to be tightened; that line is extended completely around the dock, and was supported by the steel pipe stanchions mentioned. That rail was erected and in use by November 27, 1943, and was in place and being used on February 5, 1944. On that date the "Prevail" was in about the center of the dock and in the forward end was the sub-chaser. The salvage work on this last mentioned vessel was prosecuted in three shifts because of the need for parts in other ships. At night there was a string of lights completely around the forward [fol. 249] end of the dock and at the lip of the dock; and in addition there were lights on the floor of the dock. They were in use on the evening of February 5th, although he could not say that he was in the dry dock area that night.

In view of the fact that the dry dock was desperately needed by the Navy for the repair of ships damaged in the invasion of Italy, and the parts taken from the sub-chaser were also in great demand so that other vessels of a similar character could be kept in commission, I can readily see that the use of the dock was continuous from the time it was placed in commission until long after this accident happened, and as the work was done on three shifts, lights were required at all times of darkness.

The preponderance of proof upon the subject of lights and barricade is clearly with the respondents, and libellant has, in my judgment, wholly failed to sustain his burden in that respect.

It was suggested by libellant's counsel that even though there was a rail at the time of the accident, as testified to by the sole eye witness Szalaj, that Farrell might have slipped on the stone platform of the dock and fallen under

the rail. The testimony of the eye witness, however, is that he saw him go over the rail.

I have not discussed the claim of the respondents, that in any event the accident having happened on the land there is not shown any maritime tort of which this court would have jurisdiction. I have some doubt on the subject and for that reason, I have discussed the claims of negli- [fol. 250] gence in full and found them not sustained.

The remaining question is whether libellant is entitled to maintenance and cure. The facts upon the subject of this claim are also not disputed. At the time of his accident on February 5, 1944, libellant sustained a large laceration completely through the scalp in the parietal region. X-rays taken on February 7th revealed a V shape fracture beneath the scalp laceration, and there was a spreading of the left parieto-occipital suture and a line of fracture in the temporal region; in other words, multiple and compound fractures of the skull. He was in various Government hospitals from the time of his accident until June 30, 1944, when he was discharged at Norfolk, Virginia, in the custody of his father, as completely disabled. The report of the senior surgeon to the Division of Maritime Insurance and War Shipping was that libellant is totaly blind as a result of the fracture which has caused a bilateral optic atrophy. He now suffers from complete loss of vision, severe pains in his head, and has lost some of his sense of smell and taste. He has a scar on the left temporal parietal region, a slight depression in the right parietal region. He suffered convulsions on February 15, 1945, February 10, 1946, October 12, 1946, and March 18, 1947, which the testimony relates to the severe injury to libellant's brain and which were the result of a post traumatic epilepsy. He will continue to have these spells and to have pain in the area of the fracture. He will need treatment and medical care from time to time and probably some care for the rest of his life. He [fol. 251] was always a healthy individual before his accident and never showed any signs of epilepsy before then. The medical testimony also shows that his condition of blindness is permanent, that in all likelihood his convulsive attacks will continue, and possibly become more frequent, and without any possibility of a further cure. The attacks and headaches mentioned will require some care from time to time whenever they persist.

The point is made that maintenance and cure, being an obligation arising because of the maritime nature of the contract between a seaman and his ship, cannot be awarded for injuries occurring on land. I cannot sustain that contention. *O'Donell* v. *Great Lakes Co.*, 318 U. S. 36, 41, 42. The right of a seaman to this relief is not dependent upon proof of negligence, and negligence or acts, short of culpable misconduct on the seaman's part, will not relieve the shipowner of responsibility. The seaman is protected in his right when on shore leave and while traversing an area between his ship and the public streets by an appropriate route. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730, 735, 736.

The extent of that relief was ruled upon by the Supreme Court in *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, where it was written that whether the duty of maintenance and cure extended beyond the duration of a voyage was an open question, so far as that court was concerned. In that case, a seaman was suffering from a chronic disease, which, because of an accident, resulted in a serious disabling condition. The testimony was that medical treatment and amputation of the afflicted parts might halt the advance of [fol. 252] the disease, but its manifestations were likely to occur in other parts of the body; and medical opinion was that the disease tended to be progressive and might ultimately cause death. Care and treatment at frequent intervals with periodic medical observations of the patient would be of aid in resisting its progress. It was decided, (1) that the policy underlying the doctrine of maintenance and cure called for some extension of the duty beyond the term of service; (2) that it did not impose on the shipowner an indefinite obligation to furnish medical aid, nor did the court find any basis for saying that if the disease proved incurable the duty extended beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably might be expected to result from nursing, care and medical treatment; (3) "Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service"; and (4) an award of a lump sum in anticipation of the continuing need of maintenance and cure for life, or for an indefinite period, cannot be made. This was reiterated in *Lindgren* v. *Shepard S.S. Co.*, 2nd Cir. 108 F.(2) 806. There a seaman was injured

by a fall. At the time he signed on he was suffering from tertiary syphilis, and at the time of the trial had general paresis, resulting from the disease mentioned, and was cured so far as cure was possible, but would never again be able to do the work of a seaman. He could do light work, and as a hospital outpatient, he should return for occasional examinations and treatment, but such treatment was to prevent relapses, not to prevent further cure which was impossible. Commenting on the statement of the Supreme Court quoted above from the Calmar case, Judge Swan [fol. 253] wrote that the facts in the two cases appeared similar, "But however this may be, and even if the Calmar case can be differentiated from the case at bar, we are convinced that a shipowner's duty to provide maintenance and cure ends when the seaman has attained the maximum cure possible."

The same rule has been applied in the case of an injury while in the service of the ship. *Luksich* v. *Misetich*, 9th Cir., 140 F. (2) 812, 814. *Reed* v. *Canfield*, Fed. Cas. 11,641; *The Bouker, No. 2*, 241 Fed. 831, cert. denied 245 U. S. 647.

Libellant here signed on the "Haviland" on December 16, 1943, was injured on February 5, 1944, and was hospitalized until June 30, 1944. The articles which he signed were for twelve months but the voyage actually ended on March 28, 1944, before he was discharged from the hospital at Norfolk. Under this count he makes claim as follows:

1. For wages for the balance of twelve months at $110 a month	$1,136.66
2. For bonuses from February 5, 1944, the date of the injury to April 8, 1944, when he left the Mediterranean bonus area for Norfolk, 64 days at $5 per day	320.00
3. For 100% bonus from February 5, 1944, to April 19, 1944, when he reached Norfolk, 2½ months at $110 a month	275.00
4. Repatriation expense withheld from prior earnings	191.25
Total wages and bonuses	$1,922.91

[fol. 254] Total wages and bonuses	$1,922.91
5. For maintenance and cure from June 30, 1944, when he was discharged from the Norfolk hospital, to June 10, 1947, the date of the trial, 1075 days at $3.50 a day	3,762.50
6. Bills paid to Dr. Druffner	50.00
7. Medicines, three prescriptions at $6 per month, to date of trial	216.00
8. Feed and maintenance of seeing eye dog, $15 a month, to date of trial	540.00
Total wages and bonuses and maintenance and cure	$6,491.41

I think it well settled that wages can only be allowed to the end of the voyage. Bonuses are not to be paid to a seaman who has left his ship and is on land because of illness. See Regulations & Decisions of the Maritime War Emergency Board, January 28, 1943, Code of Federal Regulations Suppl. 1943, pages 2136, 2138. I very much doubt if anything can be allowed for maintenance of the seeing eye dog. Such a charge is not within the traditional charge for maintenance and cure; it is neither maintenance nor cure. While treatment without expense was aways open to libellant at Marine Hospitals since his discharge from the Norfolk Marine Hospital, I think because of the immediate necessity for such treatment and the distance libellant would have to travel to a marine hospital, an allowance of the doctor's bill would be proper, as well as for the medicine, although there is very little proof that libellant has been required to expend $6 monthly for the same; but I can readily understand that in view of the serious nature of his injuries, and the sudden and acute consequences following upon the same, such an expenditure might well have been [fol. 255] made. But this charge and maintenance and cure cannot be allowed for life. Whether an allowance in the future is proper is most problematical under the cases cited, and the Calmar case prohibits a lump sum award. From the testimony upon the trial, it seems certain that libellant has received such maintenance and care as under the circumstances may be said to have resulted in as much cure as medical and surgical care can accomplish.

The award which will be made under this count, therefore, is as follows:

Wages from February 5, 1944, to the end of the voyage, March 28, 1944, at $110 a month	$190.67
100% bonus while on the ship from Palermo to Norfolk, 9 days	40.33
	$231.00
Less withholding tax and Federal Old Age Benefit Tax	30.31
	$200.69
Wages withheld	191.25
Dr. Druffner	50.00
Medicines	216.00
Maintenance for six months after leaving the hospital at Norfolk	640.00
Total	$1,297.94

Findings in accordance with the foregoing may be prepared by the attorney for the respondent and a copy served upon libellant's counsel within ten days. Libellant's counsel may have five days in which to object to any part thereof. The final findings and conclusions will be prepared by the court and filed.

John Bright, United States District Judge.

July 1, 1947.

[fol. 256] In United States District Court, Southern District of New York

Ad. 140-183

(Same title)

Findings of Fact and Conclusions of Law—Filed August 11, 1947

This action having been duly tried in admiralty, and the allegations, proofs and arguments of the respective parties

having been duly heard, the Court does hereby find and decide as follows:

FINDINGS OF FACT AS TO FIRST CLAIM

1. On October 15, 1942, libellant, then 22 years of age and having no prior sea experience, enlisted in the Merchant Marine and was sworn in as a member of the United States Navy. After a period of training at the United States Merchant Seaman's Training School on Hoffman Island, New York, and 17 days' service upon another ship, on September 15, 1943, he signed articles, as an oiler, on the S. S. John Hopkins for twelve months, to sail foreign, with base pay of $110 a month, plus wartime bonuses. That voyage ended on March 25, 1944. The ship was a merchant vessel, owned and operated by the United States. When it arrived at Naples, Italy, libellant, on November 13, 1943, was granted a pass by the Master to go ashore for medical treatment. He did so and, after examination and treatment at a United States Aid Station in the Port Area of Naples with instructions to return if his condition grew worse, returned to his ship the same day.

2. Libellant, his ailment having gotten worse, applied on subsequent days for a pass to go ashore and was refused [fol. 257] by the master for the reason that he had received secret sailing orders and believed that libellant's ailment was not sufficiently serious to delay sailing and libellant was informed that he could receive medical treatment at the next port of call within a short time.

3. Libellant on November 16, 1943, went ashore without the master's permission and contrary to his orders of November 15, 1943, and was admitted to a hospital at Naples where he remained from November 16, 1943, to November 26, 1943.

4. On November 17, 1943 the steamship Johns Hopkins sailed from Naples pursuant to orders and libellant being absent from the vessel without leave, was logged as a deserter.

5. The charge of desertion has been withdrawn.

6. Upon discharge from the hospital at Naples, libellant was sent to the Replacement Pool for Seamen at Naples where he remained without pay until December 15, 1943 at which time he was assigned to and went aboard the steamship James E. Haviland, a vessel owned and operated by respondent, United States of America.

7. On December 16, 1943 libellant signed articles for a voyage on said James E. Haviland, not to exceed twelve months, as oiler and at the same pay and bonuses as he received on the Johns Hopkins.

8. At the time libellant left the Johns Hopkins on November 15, 1943, there was due him as wages the sum of $777.05 against which were charges for advances, tax deductions, etc. amounting to $407.07, leaving a balance due libellant of $369.98, which sum was deposited with the Clerk of the United States District Court for the Southern District of New York.

[fol. 258] 9. Against said sum of $369.98 on deposit with the Clerk of the Court, there was a charge in connection with said deposit in the sum of $1.15 together with charges for libellant's bill for board in Naples in the sum of $36.00.

10. In January 1945, libellant was paid out of said sum on deposit the sum of $250., leaving a balance due for libellant of $82.83 which was withheld on the contingency that other bills might come forward.

11. No such bills have been presented to date.

12. The voyage of the steamship Johns Hopkins ended on March 25, 1944.

13. Libellant filed his claim concerning the matters which are subject of the first cause of action alleged in the libel pursuant to Public Law No. 17 of the 78th Congress (50 U. S. C. A., section 1291(a)) on October 12, 1945, and said claim was not disallowed other than by lapse of time.

14. The libel herein was filed on December 26, 1945.

15. Libellant has withdrawn his claim against respondent, North Atlantic & Gulf Steamship Company, Inc.

Conclusions of Law As to First Claim

First. The libel herein as against respondent, North Atlantic & Gulf Steamship Company, Inc., having been withdrawn, the libel as to said respondent is hereby dismissed without costs.

Second. The regulations promulgated and enforced by War Shipping Administration under Public Law 17 of the 78th Congress (50 U. S. C. A., section 1291(a)) tolled for a period of sixty days, the two year period of limitation pro-

[fol. 259] vided in the Suits in Admiralty Act, and as respects the first claim alleged in the libel, libellant's suit was timely.

Third. In view of the withdrawal of the charge of desertion and the fact that libellant was not repatriated until December 16, 1943, he is entitled to one month's further pay of $110; and the further sum of $70. for maintenance at $3.50 per day from November 26 to December 15, 1943.

Fourth. Libellant is entitled to the further sum of $82.83, the balance of earned wages unpaid.

Fifth. That libellant is not entitled to applicable bonuses for the period of hospitalization and while in the United States Replacement Pool at Naples, Italy, for the period from November 16 to December 16, 1943.

Sixth. Libellant is entitled to a decree against respondent United States of America upon the first cause of action alleged in the libel in the sum of $262.83.

FINDINGS OF FACT AS TO SECOND CLAIM

1. On December 16, 1943, at Naples, Italy, libellant signed articles for a voyage not to exceed twelve months on the steamship James E. Haviland, a vessel owned and operated by respondent, United States of America, as an oiler at a base pay of $110. per month plus wartime bonuses.

2. Said voyage actually ended on March 28, 1944.

3. On February 4, 1944, the James E. Haviland docked at Palermo, Italy.

4. On February 5, 1944, the entire harbor of Palermo was in control and possession of the United States Navy and was enclosed by walls and barbed wire and each gate [fol. 260] leading into *into* the area was guarded by military police.

5. Palermo harbor is shaped like the letter "C" and the Haviland was moored about the middle of the "C."

6. At the north end of Palermo Harbor which was enclosed by a wall and wire fence, there was a Navy dry dock built into the land.

7. Said dry dock was about one-quarter of a mile across the water from the dock where the Haviland lay moored and over a mile away by Palermo's public streets from the Haviland's dock.

8. The way of access to the dock where the Haviland lay moored was provided by Gate 5 adjacent to said dock.

9. The only access to Gate 1 of said Navy dry dock was by the streets of Palermo in that vicinity leading thereto.

10. There was no street or path along the shore front leading from the dock where the Haviland lay moored to said Navy dry dock and the area between was filled with debris from bombing, and no one could walk along this part of the shore front except by climbing over this debris.

11. On February 5, 1944 libellant and other members of the Haviland's crew left the vessel on shore leave passes sometime after 5 P. M., while it was still broad daylight.

12. Pursuant to curfew regulations imposed by Military authorities, libellant's shore leave pass required his return to the ship by 6:00 P. M. of the same day.

13. In issuing libellant a shore leave pass, the master of the Haviland had the right to assume that libellant was competent and able to look out for himself and would so remain while on shore.

[fol. 261] 14. At the time libellant was on shore he was engaged in purposes of his own.

15. On leaving the vessel, libellant walked through Gate 5 near the dock at which the Haviland lay moored and proceeded to the main part of the town of Palermo.

16. About 8 P. M. on February 5, 1944, at which time the weather was dark and rainy, libellant, accompanied by another seaman of the Haviland, Szalaj, started from downtown Palermo to return to the Haviland.

17. Libellant and Szalaj lost their way to Gate 5 and finally arrived at Gate 1, which was one of the entrances to the area where said Navy dry dock was located, and on exhibiting to a sentry guard at Gate 1 their shore leave passes showing that they were seamen from the Haviland they were admitted through said gate.

18. A few minutes later Szalaj, who could see libellant's figure, observed libellant go over a rail on the other side of which was the dry dock.

19. Szalaj went to the spot where libellant went over the rail and looking down saw no water in the dry dock and when he saw that libellant had fallen therein, he gave the alarm to the sentry.

20. Libellant was found at the bottom of said dry dock and was taken by ambulance to the Naval Hospital in Palermo.

21. At the time of the accident libellant was over a mile by public streets from where the Haviland lay moored and was at a place where he had no right to be.

22. At the time of libellant's accident the Navy dry dock

[fol. 262] and the area surrounding it were in possession and control of the Naval Forces.

23. Palermo was captured by the Allied Forces in July 1943 and work was immediately begun thereafter to put the dry dock in condition for operation.

24. An area fifty feet wide on either side of the dry dock was cleared and a bomb crater at the head of the dock was filled in and repaired.

25. Batteries of lights were mounted on the tops of nearby buildings so that work in three shifts could be carried on, a string of lights was erected along the edge of the dry dock, lights were placed on each of the two traveling cranes at the dry dock and also on buildings at the intersection of the streets in the vicinity in the latter part of August or middle of September 1943.

26. One or two other lights were placed on a water tower and on a pump house at the land end of the dry dock.

27. On the evening of February 5, 1944, and at the time of libellant's accident, flood lights illuminated the dock area as well as lights on the floor of the dock were lighted so as to enable repair work to continue on the Destroyer Prevail and salvage work on a subchaser.

28. There were also lights on a gangway leading from the Prevail to the shore.

29. The Navy dry dock went into operation on December 1, 1943 and thereafter was operated twenty-four hours a day until 1945.

30. Around said dry dock there was a chain railing about 36 inches in height which was erected and in use by No-[fol. 263]vember 27, 1943.

31. This chain railing about the dry dock was supported by steel posts placed along the sides of the dock at regular intervals and a chain running from post to post was equipped with turnbuckles which permitted the chains to be tightened.

32. This railing completely surrounded the dry dock and was in place and being used at the time of the libellant's accident on February 5, 1944.

33. The Destroyer Plunkett was in this dry dock from January 27, 1944 to January 31, 1944 and the Destroyer Prevail was in the dry dock from February 2, 1944 to February 8, 1944.

34. At the time of the accident on February 5, 1944, libellant sustained a large laceration completely through the

scalp in the parietal region, a "V" shaped fracture beneath the scalp laceration and a spreading of the left parieto-occipital suture and a line of fracture in the temporal region.

35. Libellant is now totally blind as a result of the fracture which caused a bilateral optic atrophy and he suffers severe pains in his head and has lost some sense of smell and taste.

36. Since the accident and as a result of the injury to his brain, libellant suffered convulsions on February 15, 1945, February 10, 1946, October 12, 1946 and March 18, 1947, said convulsions being the result of a post-traumatic epilepsy.

Conclusions of Law As to Second Claim

First. The master of the Haviland cannot be said to have failed to exercise due care for libellant's safety merely [fol. 264] because he permitted him to go ashore, the right of shore leave being an essential part of the contract and life of a seaman.

Second. The master of the Haviland was not negligent in granting libellant shore leave at Palermo on February 5, 1944.

Third. Libellant lost his way in returning to the Haviland and wandered into the dry dock area on the evening of February 5, 1944, through no fault or negligence on the part of respondents, United States of America and Luckenbach Steamship Company, Inc., their agents, servants and employees.

Fourth. Libellant had no right to be in the dry dock area at the time of his accident on the evening of February 5, 1944.

Fifth. Respondent, United States of America and Luckenbach Steamship Company, Inc. owed no duty of reasonable care to libellant inasmuch as libellant did not return to the Haviland by the way he left said ship but attempted to return by a route over which said respondents could not be charged with notice that he would traverse.

Sixth. Said respondents were under no duty to protect libellant while he was within the dry dock area as they did not know nor had they any reason or duty to know or anticipate that libellant would be in said area while returning to the Haviland.

Seventh. Libellant did not become lost in Palermo by reason of any fault or negligence on the part of the master

of the Haviland and said master cannot be charged with notice that libellant might go astray while on shore leave.

[fol. 265] Eighth: There was no duty on the part of said respondents to guard libellant while on shore leave in Palermo on purposes of his own over dangers which could not be anticipated, including the danger of falling into the dry dock where libellant had no right to be or where it was reasonable to believe or anticipate that he ever would be.

Ninth: The sentry at Gate 1 is not chargeable with want of any reasonable care and was not negligent in permitting libellant and his companion from entering the dry dock area upon the display to him by libellant and his companion of shore leave passes which had been properly issued to them.

Tenth: The Navy dry dock at Palermo and the area surrounding it was in a proper state of repair and was properly and adequately lighted and illuminated on the evening of February 5, 1944 at the time of libellant's accident.

Eleventh: The dry dock itself and the area surrounding it was properly and adequately protected and guarded by a railing on the evening of February 5, 1944, at the time of said accident.

Twelfth: Libellant completely failed to sustain the burden upon him of proof by fair preponderance of the credible evidence that his accident and consequent injuries were due to fault and negligence on the part of respondents, United States of America and Luckenbach Steamship Company, Inc.

Thirteenth: Libellant's accident and consequent injuries were solely the result of his own negligence.

Fourteenth: Libellant having failed to establish any negligence on the part of respondents, United States of America and Luckenbach Steamship Company, Inc., their [fol. 266] servants, agents and employees, the second cause of action is dismissed as to them without costs.

Findings of Fact as to Third Claim

1. Libellant has been treated without expense to himself in various Government hospitals from February 5, 1944 until June 30, 1944 when he was discharged at Norfolk, Virginia, as completely disabled.

2. Libellant is totally and permanently blind by reason of the injuries sustained on February 5, 1944.

3. Libellant's condition of blindness is permanent and his convulsion attacks possibly will continue and become more frequent without any possibility of a further cure, but from time to time he will require some medical care for his attacks of headaches and epileptic convulsions.

4. Libellant has received the maximum cure that medical and surgical aid may accomplish.

5. Libellant's wages from February 5, 1944 to the end of the Haviland's voyage on March 23, 1944, at $110 per month amount to $190.67.

6. Libellant was nine days enroute from Palermo to Norfolk for which time libellant was entitled to one Hundred percent bonus, or the sum of $40.33.

7. Libellant's wages and bonus as aforesaid amount to $231. less withholding tax and Federal Old Age Benefit tax, amounting to $30.31, leaving a balance of $200.69.

8. Libellant has incurred medical expenses in the sum of $50. and has spent for medicines the sum of $216.

9. The sum of $191.25 for wages earned prior to Febru-
[fol. 267] ary 5, 1944, is being withheld.

10. Libellant's maintenance for a period of six months after leaving the hospital at Norfolk amounts to the sum of $640.

11. Libellant now relies on a seeing eye dog to aid him in moving about.

Conclusions of Law as to Third Claim

First: The duty on the part of a shipowner to furnish maintenance and cure to a seaman does not extend beyond the time when the maximum cure possible has been effected.

Second: Libellant is entitled to his wages from the date of his injury on February 5, 1944 to the end of the voyage on March 28, 1944, at $110. per month, or the sum of $190.67; to the further sum of $40.33 representing one hundred percent bonus for the nine days he was on board ship during the voyage from Palermo to Norfolk, less Withholding and Federal Old Age Benefit Taxes in the sum of $30.31; to

the further sum of $191.25 being the wages withheld; to an allowance of $266. for medical care and for medicines; and to maintenance for a period of six months after leaving the hospital at Norfolk, at $3.50 per day or $640.; making in all a total of $1,297.94 which sum he is entitled to recover from respondents.

Third: Libellant is not entitled to maintenance for his seeing eye dog, the same being neither maintenance nor cure.

Fourth: the reasonable period for maintenance during which maximum medical cure could be attained extended to December 30, 1944.

[fol. 268] Fifth: The maximum cure possible for libellant's condition having been effected, libellant is not entitled to any further allowance in the future for maintenance and cure.

Sixth: Upon the third cause of action a decree may be entered in favor of libellant against respondents United States of America and Luckenbach Steamship Company, Inc., in the sum of $1,297.94.

And a decree accordingly is hereby directed.

Dated: August 11, 1947.

John Bright, United States District Judge.

[File endorsement omitted.]

[fol. 269] In United States District Court Southern District of New York

(Same Title) Ad. 140-183

Final Decree—November 21, 1947

This cause, involving three separate causes of action, having regularly come to be heard on the 10th, 11th, and 12th days of June, 1947 upon the pleadings and proofs adduced by the respective parties hereto and having been argued and submitted by the respective advocates having been discontinued in open court as against respondent, North Atlantic & Gulf Steamship Company, Inc.; and the court after due deliberation having rendered its written opinion on the first day of July, 1947 and its findings of

facts and conclusions of law on the 11th day of August, 1947 directing that on the first cause of action, for wages, maintenance and bonuses, libellant, William Farrell, recover of and from respondent United States of America, the sum of $262.83 and that on the second cause of action, for personal injuries, the libel herein be dismissed on the merits and that on the third cause of action, for maintenance and cure, libellant, William Farrell, recover of and from respondents, United States of America and Luckenbach Steamship Company, Inc., the sum of $1,297.94.

Now, it is, by the Court,

Ordered, Adjudged and Decreed that on the first cause of action for wages, maintenance and bonuses, libellant, William Farrell, recover of and from respondent, United States of America, the sum of $262.83 which sum shall [fol. 270-279] bear interest from the date of entry of this final decree until paid and that said libellant have execution therefor, and it is further

Ordered, Adjudged and Decreed that on the second cause of action for personal injuries, the libel herein be dismissed on the merits, and it is further

Ordered, Adjudged and Decreed that on the third cause of action, for maintenance and cure, libellant, William Farrell, recover of and from respondents, United States of America and Luckenbach Steamship Company, Inc., the sum of $1,297.94 which sum shall bear interest from the date of entry of this final decree until paid and that libellant have execution therefor.

Dated: New York, N. Y., November 21st, 1947.

John Bright, U. S. D. J.

[fol. 280] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1947

No. 214

(Argued April 6, 1948. Decided May 10, 1948)

Docket No. 20917

William Farrell, Libellant-Appellant,

against

United States of America and Luckenbach Steamship Company, Inc., Respondents-Appellees

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Appeal from a final decree of the District Court for the Southern District of New York. Affirmed

G. Lester W. Curry, Proctor for Appellant.
John F. X. McGohey, United States Attorney.
Burlingham, Veeder, Clark & Hupper, Proctors for Appellees;
G. Hunter Merritt, Counsel.

[fol. 281] Opinion

Chase, Circuit Judge:

This appeal presents questions as to the duty of the master to warn a seaman in the Merchant Marine when granting him shore leave at a port partially destroyed during the war; the duty of the government to provide a safe route to and from his ship within the area under its control; and the seaman's right to wages and maintenance and cure after being accidently injured within that area while attempting to return to his ship.

The appellant is a seaman who enlisted in the Merchant Marine on November 15, 1942. He was then twenty-two years old. After a training period, he was assigned to a ship by the War Shipping Administration and made one coastwise voyage of seventeen days. He later shipped at New York on the S.S. Johns Hopkins and went to Naples, Italy. While there, on December 16, 1943, he signed on the

S. S. James E. Haviland as a seaman with the grade of an oiler.

That ship, for which respondent Luckenbach Steamship Company was general agent and which the respondent United States owned and operated, docked at Palermo, Sicily on February 4, 1944. This port was then in the control of United States naval forces. It had been severely damaged during its capture from the enemy and, though some repairs had been made, was still in a damaged condition. Dim-out or blackout regulations were required for security, the invasion of Italy then being in progress. The port area was enclosed and kept guarded by sentries at each of five entrance gates. On February 5, 1944, the appellant applied for shore leave late in the afternoon and this was granted, he being given a pass by the master, good until six o'clock that evening. The master did not warn or instruct him as to any danger. He left the ship with three companions and went out of the guarded port area by Gate 5, which except for Gate 4, was the only entrance to [fol. 282] that part of the port area where his ship was docked. He then spent some time sightseeing in Palermo during which he had some wine and then at about eight o'clock he started with another seaman to return to his ship. It was raining and they became lost in the city but were finally directed to the port area by a local policeman and arrived at Gate 1, about a mile distant from the gate by which the appellant had left and which they were trying to find. They were admitted to the port area through Gate 1 upon presentation of their passes to the sentry on duty and soon became lost while trying to make their way to their ship, being unaware of the fact that they could do that only by going back into the city and going to Gate 4 or Gate 5. While walking along a muddy street in the semi-darkness they kept upon opposite sides in order both to be safe from approaching vehicles which would be running with dimmed or no lights and in the hope that they could obtain a ride to the dock where their ship was tied. While they were there walking some forty or fifty feet apart, the appellant's companion saw him fall over a railing and disappear. His companion went to his assistance and found that he had fallen into a graving dock which the navy was using for repairing ships. This dry dock was being used twenty-four hours a day and was surrounded by a chain strung thirty-six inches above the top of the sides of the dock and held there by steel

posts. There were some lights in the area of the dock and enough lights on the floor of it to enable repair work to be done on a destroyer and a sub-chaser then in the dock. It was at least light enough for appellant's companion to be able to see him fall at a distance of forty or fifty feet.

The appellant was severely injured in the fall and as a result has become permanently blind and subject to recurring pain, especially in his head, and to epileptic attacks which may well become progressively worse as he grows [fol. 283] older. He was given treatment in the naval hospital at Palermo and at other naval hospitals abroad and in this country until his condition had, before trial, improved as much as can be expected under medical care. Henceforth nothing can be done by further treatment except to alleviate temporarily whatever discomfort his condition may cause from time to time.

The appeal is from a final decree dismissing on the merits a cause of action under the Jones Act * and the Suits in Admiralty Act ** and awarding wages plus bonus to the end of the voyage together with $266 for medical care and medicines and $3.50 per day for maintenance during a period of six months, which was the time found to have been required to make his recovery as complete as possible, after he left the naval hospital in this country where he last was hospitalized.

There is ample support in the evidence for the findings above outlined and they in turn support the conclusion that neither of the respondents was negligent. The master was certainly under no obligation to deny shore leave to the appellant because the port of Palermo had previously been bombed and the destruction had not been repaired. He was on the contrary bound to give reasonable recognition to the seaman's right to shore leave when off duty. *Aguilar* v. *Standard Oil Co. of New Jersey*, 318 U. S. 724. Nor was the master under any duty to warn the appellant that the dock area had been bombed, for that was obvious. Though much stress has been put upon the appellant's lack of experience as a seaman, there is nothing to show that he did not have the ordinary capacity of a young man of his age to realize that he was taking his leave on shore in a port partially destroyed and under limited illumination because of condi-

* 46 U. S. C. A. §688.

** 46 U. S. C. A. §745 et seq.

[fol. 284] tions resulting from the war and that he should govern himself accordingly. There is no proof that unusual danger in going to and from the ship by way of Gate 5 required special warning. And it cannot be said that the master was bound to foresee that the appellant might overstay his leave, lose his way, and reenter the port area at another gate a mile or so away from where he should have done so and unnecessarily subject himself to whatever danger was there. Thus it was not negligent to issue the pass and let the seaman take his leave without instructions.

It is argued that the respondent government was, because it was in control of the entire area, under the duty to maintain that area, which it permitted the appellant to enter while attempting to return to his ship, safe for that purpose.* But the findings sustain the conclusion that it was not negligent in that respect. These findings, which cannot be said to be clearly erroneous,** are that the dry dock did have a guard railing and that there was enough lighting in that area. While there was some conflicting testimony, several witnesses testified that the guard railing was put up immediately after a ship was docked and extended completely around the dock except at the water edge. One of these witnesses stated that the railing was up both a short time before and a short time after the accident. And the only eye-witness to the accident testified that the appellant fell over the chain. There was also much testimony to the effect that the area immediately surrounding the dry dock was kept lighted to a certain extent, despite the dim-[fol. 285] out or blackout in the city and the harbor area in general, since work was going on continually, night and day. The lighting consisted of flood lights around the edge of the dock directed towards the work going on in it, lights on some of the buildings in the dry dock area and on the ends of the booms of three cranes used in the repair work, and

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* See *Marceau* v. *Great Lakes Transit Corp.*, 2 Cir., 146 F. 2d 416, cert. denied, 324 U. S. 872; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36.

** As we have frequently stated, we will not disregard the findings of fact of the district court sitting in admiralty unless they are "clearly erroneous." *E.g.*, *The Paul Dana* v. *Socony Vacuum Oil Co.*, 2 Cir., 165 F. 2d 78; *Petterson Lighterage & Towage Corp.* v. *New York Central R. Co.*, 2 Cir., 126 F. 2d 992.

gangway lights on one of the vessels in the dock. Perhaps the lighting was insufficient on a dark and rainy night such as that of the accident to enable one to see everything in the area clearly, though the appellant's fall was seen from a distance of forty to fifty feet. But, it is to be remembered, this was war-time; Palermo was a base very near the actual threatre of operations. If dim-out or blackout regulations were required for the city itself, it could well have been thought necessary for the safety of all to keep lighting in the harbor area, perhaps the most likely target for bombing raids, to a minimum. Under these circumstances, we think that the government was not negligent in failing to guard more adequately, by lights or otherwise, against the possibility of a fall into the dry dock by a seaman returning to his shop docked in another part of the harbor.

To allow the appellant his wages in full to the end of the voyage only instead of for a full year was also correct. *The Osceola*, 189 U. S. 158, 175. The appellant signed on at Naples as a replacement while the original voyage was in progress. His shipping articles provided that: "It is agreed between the master and seamen • • • of the S.S. James E. Haviland • • • now bound from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the master may direct • • • and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months." The voyage was to end in the United States and did end there at the Port of New York on March 28, 1944. It seems clear that the agreement was for employ-[fol. 286] ment for the duration of the voyage only and not for twelve months, the clause, "for a term of time not exceeding 12 (twelve) calendar months," serving to limit the period for which the appellant was employed, not to extend it beyond the end of the voyage. *The Ipswich*, D. Md. 46 F. 2d 136. In *Jones* v. *Waterman S.S. Co.*, 3 Cir. 155 F. 2d 992, on which the appellant relies, the shipping articles covered one or more voyages as the master might direct within a limited term and is distinguishable on that ground. While in *Shields* v. *United States*, E. D. Pa., 73 F. Supp. 862, no notice seems to have been taken of this distinction, we think it decisive.

The allowance of bonus stands upon a different footing. The shipping articles contained a provision that "all deci-

sions, amendments and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement." A decision of this Board on February 27, 1943* provided that no bonus should be paid to a seaman while on land, making no exception in the case of one leaving his ship because of illness or injury. He was therefore correctly denied any bonus for the period while he was ashore.**

Appellant claims a right to maintenance and cure for life or "as long as the need continues." Generally speaking, however, the duty of the ship owner to provide maintenance and cure for the seaman "does not extend beyond the time when he is as completely cured as he ever can be." *Lindgren* v. *Shepard S.S. Co.*, 2 Cir., 108 F. 2d 806, 807; see *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525, 530; *De Zon* v. *American President Lines, Ltd.*, 318 U. S. 660, 667 n.3. Appellant relies on a dictum in the *Calmar* case that as to [fol. 287] "those cases where the incapacity is caused by the employment" different "considerations" might "be thought to require a more liberal application of the rule." 303 U. S. at 530.

It is clear that, as we have held above, the appellant's injury was not caused by his employer's negligence. Perhaps, however, it was caused by his "employment," within the meaning of the *Calmar* dictum above noted. The appellant being on shore leave, in the process of returning to his ship, and on the employer's premises, the point seems arguable, it not being clear that the injuries were received as a result of intoxication or some other willful misbehavior. See *Aguilar* v. *Standard Oil Co. of New Jersey*, 318 U. S. 724; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36; *Marceau* v. *Great Lakes Transit Corp.*, 2 Cir., 146 F. 2d 416, cert. denied, 324 U. S. 872. But this question we need not decide. It is sufficient to say here that, even if the appellant's injuries were "caused" by his "employment," we think the general rule applicable. *Liksich* v. *Misetich*, 9 Cir., 140 F. 2d 812, cert. denied, 322 U. S. 761 (seaman's

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* Decision 2 A, Art. VI-C(1), 8 Fed. Reg. 3461, 3462. Code Fed. Reg. (Supp. 1943) 2138.

** The trial court awarded him his bonus during the time he was being repatriated and no appeal was taken from that part of the decree below.

injury received as the result of a fall sustained in the course of his employment); *cf. Lindgren* v. *Shepard S.S. Co., supra* (seaman's service assumed to have aggravated a preexisting disease). Needless to point out, we also do not pass upon the case where the seaman's injuries are caused by the employer's fault or negligence.

In the *Calmar* case, at pages 531 and 532, it was said, however, that, "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of the trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained." In this instance, it was found correctly that, "Libellant has been treated without expense to [fol. 288] himself in various Government hospitals from February 5, 1944 until June 30, 1944 when he was discharged at Norfolk, Virginia, as completely disabled," and that, "Libellant has received the maximum cure that medical and surgical aid can accomplish." He was awarded what he had expended for medical treatment and medicines up to the date of the trial and in addition allowed maintenance to December 30, 1944 (six months after his discharge from the Norfolk hospital) as for the "reasonable period for maintenance during which maximum medical cure could be attained."

Were it not for the above quoted language in the *Calmar* case we would have no hesitancy in affirming the decree below. That language, however—in conjunction with the fact that the reversal of the decree was "without prejudice to any later suit by respondent to recover maintenance and cure to which he may then be entitled"—is conceivably susceptible to the interpretation that, though the seaman is as cured as he ever can be, he may still recover such amounts as are needed in a definitely ascertainable period in the immediate future to provide care of a clearly determinable kind. But if this interpretation were the correct one, the language would seem to be inconsistent with that on page 530 of the opinion stating in effect that the duty to provide maintenance and cure ends when the seaman is as completely cured as he ever can be. We take it, therefore, that, though Taylor, the seaman in the *Calmar* case, was afflicted with an "incurable malady," he was not at the time of the trial as cured as he could ever possibly be.

Indeed, the Court said, "Care and treatment at frequent intervals, with periodic medical observation of the patient, are of aid in arresting its [the disease's] progress." Page 526. Moreover, as the Circuit Court of Appeals stated, 92 F. 2d 84, 87, the incurable disease from which Taylor suffered was "of a progressive nature" so that it could not be [fol. 289] said that "the ordinary means which medical science affords for the treatment and care of this disease will be exhausted prior to his death." Here that is not the case. It was justifiably found that although the appellant will from time to time require some medical care to alleviate his attacks of headaches and epileptic convulsions, which may indeed become worse in the future, he has received the maximum cure that medical treatment and surgical aid may accomplish to forestall such future trouble.

Decree affirmed.

[fol. 290] In United States Circuit Court of Appeals, Second Circuit

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

William Farrell, Libellant-Appellant,

vs.

United States, & ano., Respondents-Appellees

Appeal from the District Court of the United States for the Southern District of New York.

Judgment—Filed May 10, 1948

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 291-298] [File endorsement omitted]

[fol. 299] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 22, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 300] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed December 8, 1948

It is hereby stipulated and agreed by and between counsel for petitioner and counsel for respondents that the following portions only of the certified transcript of record now on file in the office of the Clerk of this Court shall be printed:

1. Libel: all of page 5 and through paragraph "Second" on page 6; paragraph "Seventh" on page 7; all of pages 9 through 15.

2. Answer: all of page 18; paragraph "Seventh" on page 19; all of pages 21 through 24.

3. Opinion of the District Court: all of pages 236 through 255.

4. Findings of Fact and Conclusions of Law: all of pages 256 through 268.

5. Final Decree of District Court: all of pages 269 through 270.

6. Opinion of the United States Court of Appeals for the Second Circuit: all of pages 280 through 289.

7. Decree of the Court of Appeals: all of page 290.

It is further stipulated and agreed that the remaining portions of the certified transcript of record, including the exhibits, which are not being printed may be referred to by the Court or by the parties hereto in their briefs or upon

oral argument with the same force and effect as if they had been printed.

G. Lester W. Curry, Counsel for Petitioner William Farrell. Philip B. Perlman, Solicitor General of the United States.

December 6, 1948.

[fol. 301] [File endorsement omitted.]

Endorsed on Cover: Enter Silas Blake Axtell. File No. 53269. U. S. Court of Appeals, Second Circuit, Term No. 267. William Farrell, Petitioner, vs. United States of America, War Shipping Administration, Luckenbach Steamship Company, Inc. Petition for writ of certiorari and exhibit thereto. Filed September 9, 1948. Term No. 267 O. T. 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 267

267

WILLIAM FARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Petition	1
Summary Statement of Matter Involved	1
Maintenance and Cure	2
Wages	3
Basis of the Court's Jurisdiction	4
Questions Presented	5
Reasons Relied Upon for the Allowance of the Writ	5
Brief	7
Opinions of the Courts Below	7
Specification of Errors	8
The Argument	10
POINT I—Maintenance and Cure	10
POINT II—Wages	16
Conclusion	22

TABLE OF CASES

Aguilar v. Standard Oil Co., 318 U. S. 724	16
A. M. Webb & Co., Inc. v. Robert P. Miller Co., 157 F. 2d 865	20
Bach, et al. v. Friden Calculating Machine Co., Inc., 155 F. 2d 361	20
Calmar S. S. Co. v. Taylor, 303 U. S. 525	3, 5, 6, 8, 9, 10, 12, 13, 14

PAGE

Enochasson v. Freeport Sulphur Co., et al., 7 F. 2d 674 ..... 17, 18, 19

Jones v. Waterman S. S. Corp., 155 F. 2d 992; aff. 318 U. S. 724 ..... 6, 18

Labor Board v. Waterman S. S. Corp., 309 U. S. 206 20

Loverick v. Warner, 118 F. 2d 690; Cert. den. 313 U. S. 577 ..... 5, 15

Luksich v. Misetich, 140 F. 2d 812; Cert. den. 322 U. S. 761 14

Marriman Medical Supply, Inc. v. Ft. Dodge Serum Co., 47 F. 2d 458 20

Mason v. Evanisevich, 131 F. 2d 858 19

Moran v. Standard Oil Co., 211 N. Y. 187 20

O'Brien v. Miller, 168 U. S. 287 21

Prémeaux v. Socony-Vacuum Oil Co., 192 S. W. 2d 138 15

Reed v. Canfield, Fed. Cases, No. 11641 ..... 13, 16

Seville v. United States, 163 F. 2d 296 15

Shields v. U. S., 73 F. Supp. 862 19

Smith v. U. S., 167 F. 2d 550 16

The Bouker No. 2, 241 F. 831 ..... 14, 15

The Ipswich, 46 F. 2d 136 21

The J. F. Card, 43 F. 92 ..... 13, 15

The Osceola, 189 U. S. 158 10

The Thomas Tracy, 24 F. 2d 372 20

Thomas A. Edison, Inc. v. Blackman Distributing Co., 66 F. 2d 722 20

TABLE OF STATUTES

	PAGE
46 U. S. C. A., Section 572	17
46 U. S. C. A., Section 570	17
50 U. S. C. A., Appx., Section 1291	18
46 U. S. C. A. Section 566	15
46 U. S. C. A., Section 713, Table A	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

WILLIAM FARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Wiliam Farrell, seaman in the Merchant Marine, for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, respectfully shows:

Summary Statement of Matter Involved

This petition for certiorari is made upon a typewritten record in view of the petitioner's destitute condition,—the facts of the impoverished condition of the petitioner and the petitioner's family are stated in a petition, dated De-

cember 2, 1947, to proceed upon a typewritten record which was granted by the court, there being no opposition (R. 294).

The petitioner urges a review by this Court of the law governing his cause for maintenance and cure and for wages as applied to the facts in his case as those facts were stated by the Circuit Court of Appeals for the Second Circuit. Petitioner does not urge review of the law or facts relating to his cause for negligence. The facts of the case on the issues of maintenance and cure and wages are not in dispute (R. 236, 250). We therefore summarize only those facts relating to the issues of maintenance and cure and wages.

Maintenance and cure. During the course of his wartime service in the Merchant Marine, and while temporarily in a replacement pool for seamen at Naples, Italy, and on December 16, 1943, Farrell signed on the "S. S. James E. Haviland" as a seaman with the grade of oiler. The "Haviland" was owned and operated by the United States with the Luckenbach Steamship Company as general managers. Farrell was then about twenty-two years old (R. 281, 237).

On February 5, 1944, while the "Haviland" was docked at Palermo, Italy, Farrell received shore leave late in the afternoon and left the ship with three companions. Palermo was then in a damaged condition following its capture from the enemy. The invasion of Italy was then in progress, and dimout or blackout regulations were required (R. 281, 239).

Farrell started to return to the "Haviland" with another seaman about eight o'clock that evening. It was raining and they became lost in the city but were directed to the port area by a local policeman. They arrived at Gate 1 of the area which was about a mile distant from Gate 5, the gate by which they had left and which they were trying to find. They were admitted to the port area through Gate 1 upon presentation of their passes to the sentry on duty and endeavored to make their way to the ship (R. 282, 240).

While Farrell and his companion were walking along a muddy road in the semi-darkness on opposite sides of the road in order to be safe from approaching vehicles running with dimmed or no lights, Farrell fell into a graving dock (R. 282, 241).

From the time of the accident until June 30, 1944, Farrell was in several government hospitals, and on that date he was discharged at Norfolk, Virginia as "completely disabled" (R. 283, 288, 250).

At the time of the trial, June 10-12, 1947 (R. 269), it was shown that as a result of the fall, Farrell became permanently blind and subject to recurring pain, especially in his head. It was also found that he suffered from convulsive attacks coming from traumatic epilepsy, the result of the skull fracture, which may well become worse as he grows older (R. 282, 241, 250). He was always a healthy individual before this accident (R. 251).

Both of the lower courts held that Farrell would continue to need treatment and medical care from time to time to alleviate his attacks of headaches and epileptic convulsions, and that these may grow worse (R. 289, 250).

Farrell was awarded what he had spent for medical treatment and medicines up to the date of trial and in addition was allowed maintenance to December 20, 1944, equivalent to six months after his discharge from the Norfolk hospital, as the full measure of the responsibility of the respondents for Farrell's maintenance and cure (R. 288, 255).

It is believed that Farrell is entitled to "a more liberal application of the rule" of maintenance and cure as stated in the *Calmar* case, 303 U. S. at page 530.

Wages. Farrell enlisted in the Merchant Marine on November 15, 1942. After a period of training he shipped on the "S. S. Johns Hopkins", owned and operated by the United States, as an oiler on September 15, 1943. He left the "Hopkins" at Naples, Italy, to enter a hospital for ten

days and was then assigned to the replacement pool in Naples (R. 281, 236, 237).

The rate of pay received by Farrell on the "Hopkins" was $110 per month and when he later signed on the "Haviland" at Naples on December 16, 1943, he signed on in the same grade of oiler and with the same rate of pay. He was so engaged at the time of his accident on February 5, 1944, which completely disabled him (R. 281, 237). The controversy in this case arises with respect to his wages due from the "Haviland" only.

The shipping articles on the "Haviland" provided (R. 285, Exhibit 3, introduced at page 48 of the typewritten record):

> "It is agreed between the master and seamen * * * of the S.S. James E. Haviland * * * now bound from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the master may direct * * * and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months."

The shiping articles it will be noted did not use the word "voyage" but both courts below concluded that the "voyage" of the "Haviland" ended May 28, 1944 and that Farrell was entitled to wages only until that time (R. 285, 255). Farrell claims to be entitled to his wages for the full twelve months of his contract or until December 16, 1944.

The Basis of the Court's Jurisdiction

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended, Title 28, U. S. C. A. Section 347 (a).

The date of the judgment sought to be reviewed is May 10, 1948 (R. 290). A petition for a rehearing was entertained by the Circuit Court and denied on June 11, 1948 (R. 296).

Questions Presented

(1) Was there a correct interpretation by the Circuit Court of Appeals in this case of the rule of maintenance and cure as applied to a seaman injured in the service of his ship and resulting in permanent and total disability?

(2) Is the petitioner, a seaman injured in the service of his ship resulting in permanent and total disability and admittedly in need of medical care from time to time, entitled to "a more liberal application of the rule" of maintenance and cure than he received in this case?

(3) Did the Circuit Court properly construe the petitioner's term of service as stated in his shipping articles?

(4) Was the seaman Farrell deprived of the benefit of the provisions contained in 46 U. S. C. A. Sections 572, 570?

Reasons Relied Upon for the Allowance of the Writ

The decision of the Circuit Court of Appeals for the Second Circuit in this case on the question of maintenance and cure is in conflict with the applicable decision of this Court in *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525 (1938), and is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Loverich* v. *Warner*, 118 F. 2d 690 (1941); cert. denied 313 U. S. 577.

The opinion of the Circuit Court (R. 288), confesses considerable difficulty in determining the meaning of this Court and the law intended to be declared by this Court in the *Calmar* case on the subject of maintenance and cure, and this would seem to indicate a need for a clarifying statement by this Court.

We submit that the pertinent question of the issue of maintenance and cure in this case is whether a seaman

totally and permanently disabled in the service of his ship and admittedly in need of medical care from time to time, is entitled to a more liberal application of the rule than merely maintenance and cure to such time as he is as "cured as he ever can be", and that that question was left open in the *Calmar* case and is a question of great importance not only to the petitioner but to great numbers of seamen, and that that question has not been but should be determined by this court.

The decision of the Circuit Court of Appeals for the Second Circuit in this case on the question of wages is in direct conflict with the decision of the Third Circuit Court of Appeals in the case of *Jones* v. *Waterman S.S. Corp.*, 155 F. 2d 992 (1946).

Unless corrected by this Court, a way has been opened for shipowners and operators to avoid and evade the provisions of 46 U. S. C. A. Sections 572 and 570 which were drafted for the protection of the seaman.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

WILLIAM FARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals for the Second Circuit in this case is reported at 167 F. 2d 781. The opinion of the District Court for the Southern District of New York appears in the typewritten record at pages 236-255.

Specification of Errors

(1) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

> "Generally speaking, however, the duty of the ship owner to provide maintenance and cure for the seaman 'does not extend beyond the time when he is as completely cured as he ever can be' " (R. 286).

(2) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

> "It is sufficient to say here that, even if the appellant's injuries were 'caused' by his 'employment', we think the general rule applicable" (R. 287).

(3) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

> "Were it not for the above quoted language in the *Calmar* case we would have no hesitancy in affirming the decree below. That language, however—in conjunction with the fact that the reversal of the decree was 'without prejudice to any later suit by respondent to recover maintenance and cure to which he may then be entitled'—is conceivably susceptible to the interpretation that, though the seaman is as cured as he ever can be, he may still recover such amounts as are needed in a definitely ascertainable period in the immediate future to provide care of a clearly determinable kind. But if this interpretation were the correct one, the language would seem to be inconsistent with that on page 530 of the opinion stating in effect that the duty to provide maintenance and cure ends when the seaman is as completely cured as he ever can be. We take it, therefo , that, though Taylor, the seaman

in the *Calmar* case, was affected with an 'incurable malady', he was not at the time of the trial as cured as he could ever possibly be. Indeed, the Court said, 'Care and treatment at frequent intervals, with periodic medical observation of the patient, are of aid in arresting its (the disease's) progress.' Page 526. Moreover, as the Circuit Court of Appeals stated, 92 F. 2d 84, 87, the incurable disease from which Taylor suffered was 'of a progressive nature' so that it could not be said that 'the ordinary means which medical science affords for the treament and care of this disease will be exhausted prior to his death.' Here that is not the case" (R. 288).

(4) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

"To allow the appellant his wages in full to the end of the voyage only instead of for a full year was also correct" (R. 285).

(5) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

"The voyage was to end in the United States and did end there at the Port of New York on March 28, 1944. It seems clear that the agreement was for employment for the duration of the voyage only and not for twelve months, the cause, 'for a term of time not exceeding 12 (twelve) calendar months,' serving to limit the period for which the appellant was employed, not to extend it beyond the end of the voyage" (R. 285).

THE ARGUMENT

POINT I

Farrell's case being that of injuries received in the service of the ship, the Court should apply a more liberal rule of maintenance and cure than merely that to such time as he is as completely cured as he ever can be.

The difficulty here is in the application of the law laid down in the *Calmar* case, 303 U. S. 525 (1938).

In the *Calmar* case, Mr. Justice Stone writing for the Court considered the point left open in the case of *The Osceola*, 189 U. S. 158 (1903), as expressed in the rule, stated on page 175:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, *at least* so long as the voyage is continued.' (Emphasis supplied.)

and was applying this law to the case of an incurable disease manifesting itself during the employment, but not caused by it. The seaman had stubbed his toe in the engine room and had alleged that that accident was the cause of his disease known as Buergers Disease, and the Trial Court had held and the Supreme Court had agreed, page 529, that the disease was not caused by the injury to his foot.

Two classes of chronic cases were discussed in the *Calmar* case and were described at page 529 as:

(1) where "the efficient cause of the injury or illness was some proven act of the seaman in the service of the ship";

(2) where "it was deemed enough that he was incapacitated when subject to the call of duty as a seaman, and that his incapacity continued after the voyage had ended".

The Court then states the question involved as follows, page 530 (clearly referring to the second class):

> "There remain the questions whether in the case of a chronic illness the duty continues so long as medical attendance and care are beneficial, until death if the need lasts so long, and whether a lump sum may be awarded to defray the cost of meeting the anticipated need."

The Court then refers to both classes of cases and states the rule applicable to each class. In stating the rule applicable to class (1), the Court stated at page 530:

> "In answering the first we lay to one side those cases where the incapacity is caused by the employment. As to them considerations not present here may apply, which might be thought to require a more liberal application of the rule than we think is called for in this case."

In stating the rule applicable to class (2), the Court states at page 530:

> "We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment. This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service."

But the Court modifies this stand as to the rule applicable to class (2) in a concluding paragraph, page 531, where it is stated:

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

If this is so, i.e., if the classes of maintenance and cure cases referred to in the *Calmar* case and the rules applicable thereto are as we have stated them, then it can not be true as the Circuit Court has stated in its opinion of May 10, 1948 (R. 287), that "It is sufficient to say here that, even if the appellant's injuries were 'caused' by his 'employment,' we think the general rule applicable".

It can not be true, because the Supreme Court took the pains to state the two classes and the different rules applicable to each.

The words on page 531 of the *Calmar* case, reading "The seaman's recovery must therefore be measured in each case * * *" are doubtless the words that lead this Court to adopt the interpretation that the Supreme Court was announcing one rule for both classes of cases. It is submitted, however, that the Supreme Court was merely referring to each case of the latter class of cases mentioned; to wit, "incapacitated when subject to the call of duty as a seaman * * * incapacity continued after the voyage * * *" or as later and more specifically defined "the incurable disease which manifests itself during his employment but is not caused by it".

The Supreme Court had "laid aside" the first class of cases of "proven acts of the seaman in the service of the ship", or as later referred to "where the incapacity is

caused by the employment" as to which "a more liberal application of the rule" might be called for.

We submit that the Supreme Court was referring to just such an injury as Farrell sustained in this case and was distinguishing it from the disease, bodily infirmity and sickness cases, and other cases not "incurred" in the service of the ship,—cases which manifest themselves during the employment but are not caused by it, such as the Court had before it in the *Calmar* case.

This is clearly shown by the three cases the Supreme Court referred to, middle of page 530. In the first of these cases, *Reed v. Canfield*, Fed. Cases, No. 11641 (C. C. A. Mass., 1832), the injuries consisted of frozen feet causing amputation of the toes and were due to the seaman being blown out to sea in a small boat while returning to the ship, a whaler. Judge Story decided in this case that the injuries were received in the service of the ship and affirmed an award of maintenance and cure incurred during the year between the time of the injury and the trial.

In the case of *The J. F. Card*, 43 F. 92 (D. C. E. D. Mich., 1890), referred to by the Supreme Court, the case was that of injuries apparently not chronic, consisting of a capsular fracture or bruise sustained by being hit by a boom and falling to the deck, while reefing a mainsail on the ship on Lake Erie. There was no question raised as to whether the injury was caused by the employment. The only question was as to the duration of the maintenance and cure. The Court reduced an award of seven weeks' maintenance and cure and allowed only physicians' fees and return fare, pointing out that the seaman could have been treated, free of expense to himself and the owners of the ship, at a marine hospital and stating that the rule adopted in *Reed v. Canfield* was for the protection of seamen on long ocean voyages and not to the short trips customary in Great Lakes shipping.

The third and last case referred to by the Supreme Court was a case from the Second Circuit, *The Bouker No. 2*, 241 F. 831 (1917), and was a case of pneumonia, the seaman having felt unwell a few days before he declared himself too sick to work and went home. The seaman was an engineer on a steam tug hauling garbage scows, and making two trips per day in good weather, at a stipend per week amounting to about $100.00 per month, plus food and quarters while on the tug. The Court allowed maintenance and cure for as long as "he would have remained in the marine hospital had he gone there". Judge Hough stated in this case that the limits of cure or care must always depend upon the facts of each particular case. The seaman had sued in *forma pauperis* and had alleged negligence because of the dampness and unwholesome condition of the sleeping quarters. The libel was not sustained on the negligence, but the owners of the steam tug appealed the award of maintenance and cure. The seaman had apparently recovered at the time of trial.

All three of these cases relied upon by the Supreme Court in the *Calmar* case seem to us, therefore, to be cases where the incapacity was caused by the employment and, therefore, the meaning of Supreme Court's opinion must have been that the different and more liberal rule referred to applied to that class of cases.

The citation by the Second Circuit of the case of *Luksich* v. *Misetich*, 140 F. 2d 812 (C. C. A. 9, 1944), with denial of certiorari, 322 U. S. 761, as the sole authority of the Court's ruling allowing maintenance and cure only to such time as the seaman is as cured as he ever can be, would seem to indicate that the Second Circuit considered the denial of the certiorari as indicating a retraction or change of opinion by the Supreme Court as to the view stated in the *Calmar* case.

The *Luksich* case, however, would seem to be insufficient authority for this proposition, because the seaman there

fisherman who had signed an agreement to fish on for the tuna season only,—a short season. This, therefore, be a special case, as pointed out in *The ard* and *The Bouker No. 2, supra.* See also the stat- provision in *U. S. C. A., Title 46,* Sect. 566, making re fisherman a special case.

so seems that the Ninth Circuit did not consider the case authority for situations like that of the case because in the later case of *Seville* v. *United States,* 2d 296, 299 (1947), a case of fractures of bones in d and wrist sustained while unloading ship, in which nce was not established, the statement in the *Luk-* se is referred to as dictum.

hermore, the only other citation of the *Luksich* case, han the one just cited and in the case at bar, is by preme Court of Texas in the case of *Prereaux* v. *Vacuum Oil Co.,* 192 S. W. 2d 138 (1946), in a ction, and by way of dictum.

if the case at bar were a case of the second class, an incapacity manifesting itself during the employ- t not caused by it, it is submitted that too harsh a s been applied by applying the criteria of *improve-* ther than of *benefit,* or at least, of *need.* All three e criteria are found in the quotations from the case, *supra.*

it Judge Clark, by way of a strong dissenting opin- he case of *Lov rich* v. *Warner,* 118 F. 2d 690, 697 A. 3, 1941), took issue as to whether the criteria be improvement, as he concluded, or benefit, as the y of the Court had held. With this strong dissent avor, a petition for certiorari was presented to the upreme Court and certiorari was denied, 313 U. S.

overich case was that of a throat cancer manifest- f during employment, but not claimed to be caused

by it and, although as the Court pointed out, there was some question about it, this case therefore may be taken as a case of the second class. If this liberal rule of benefit applies to the second class of cases, then a fortiori, it would apply to the first class, as to which a more liberal rule is required.

The Circuit Court stated as a fact, in its opinion (R. 289), that "the appellant will from time to time require some medical care to alleviate his attacks". Certainly by alleviating his attacks, he would benefit, and who is to say that such alleviation is not "needful", particularly as to a seaman, a ward of the Court?

We do not argue at length the question as to whether the injuries to Farrell were caused by the employment as we consider from the Circuit Court's opinion that the Circuit Court was fairly well persuaded that they were.

We regard the underlying facts as settled by the holding of the Circuit Court (R. 287), that Farrell was "on shore leave in the process of returning to his ship" and that he was not injured "as a result of intoxication or other wilful misbehaviour.

The facts being as found, the case appears to us to be on all fours with *Reed* v. *Canfield, supra,* and amply supported by *Aguilar* v. *Standard Oil Co.* (Case No. 454), 318 U. S. 724, 726, 736 (1943). See also *Smith* v. *U. S.*, 167 F. 2d 550 (C. C. A. 4, 1948).

POINT II

The petitioner should have been allowed wages for the full twelve months stipulated in his shipping articles.

The pertinent portions of Farrell's shipping articles are quoted in the opinion of the Circuit Court (R. 285), and *supra,* page 4.

It will be noted that the Circuit Court in its opinion erroneously uses the word "voyage" as though the word "voyage" were contained in that agreement, whereas the fact is that it is not; but also and more important apparently refers to that word as having some well defined and understood meaning, not explained by the Circuit Court. It is submitted that the term "voyage" is used in various senses and properly refers to the whole term of the mariner's employment, *Enochasson* v. *Freeport Sulphur Co., et al.*, 7 F. 2d 674, 675 (D. C. S. D. Texas, 1925), and that if this is so, there was manifest error in the decision.

A much more serious error, however, appears in the Circuit Court's decision on the subject of wages. The only words in the shipping articles covering the term, as distinguished from the place of the employment, are those reading "for a term of time not exceeding 12 (twelve) calendar months".

U. S. Code, Title 46, Section 572, states:

> "A master of a vessel in the foreign trade may engage a seaman at any port in the United States, in the manner provided by law, to serve on a voyage to any port, or for the round trip from and to the port of departure, or for a definite time, whatever the destination. The master of a vessel making regular and stated trips between the United States and a foreign country may engage a seaman for one or more round trips, or for a definite time, or on the return of said vessel to the United States may reship such seaman for another voyage in the same vessel, in the manner provided by law."

U. S. Code, Title 46, Section 570, states:

> "Every master of a merchant vessel who engages any seaman at a place out of the United States, in which there is a consular officer shall, before carrying such seaman to sea, procure the sanction of such officer,

> and shall engage seamen in his presence; and the rules governing the engagement of seamen before a shipping commissioner in the United States, shall apply to such engagements made before a consular officer; and upon every such engagement the consular officer shall indorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence, and otherwise duly made."

It is only as an agreement for employment for 12 (twelve) calendar months, therefore, that this agreement meets the statutory requirements, *i. e.*, "for a definite time."

The Clarification Act; U. S. Code, Title 50, Appx. Section 1291, gives to seamen employed through the War Shipping Administration the rights of seamen on privately owned and operated vessels.

The Circuit Court of Appeals, Second Circuit, refused to recognize as authority the previous decision of the Third Circuit in *Jones* v. *Waterman S. S. Corp.,* 155 F. 2d 992 (1946, affirmed 318 U. S. 724), upon the ground that the agreement there involved covered one or more voyages as the master might direct within a limited term. The authority upon which the Third Circuit relied in the *Jones* case, however, that of *Enochasson* v. *Freeport Sulphur Co., et al.,* 7 F. 2d 674 (D. C. S. D. Texas, 1925), contains a long and learned discussion of the subject.

The shipping articles in the *Enochasson* case provided for:

> "Trading to or between the United States and the Republic of Mexico or the West Indies as the master may direct and such other ports or places in any part of the world as the master may direct and back to a final port of discharge in the United States for a term of time not to exceed six calendar months."

These articles, therefore, were very similar to those at bar in providing for going to "such other ports or places in any part of the world as the master may direct."

The libellant in the *Enochasson* case had served on the vessel for three months and ten days and had made several voyages between Mexico and Texas and Cuba and Texas. He was awarded wages for the full six months. The *Enochasson* case was also cited and followed by the Ninth Circuit in the later case of *Mason* v. *Evanisevich*, 131 F. 2d 858 (1942).

The articles as they are written by the respondents-appellees relating to the description of the voyage (U. S. C. A. Title 46, Sect. 713, Table A), and using the construction put upon them by the Circuit Court of Appeals for the Second Circuit, would permit the employer to terminate the employment when the seaman falls ill or is injured in the next port of discharge in the United States, or to continue on if the seaman were then able to serve,—certainly a one-sided contract.

The construction adopted by the Circuit Court of Appeals also requires a reading into the articles, after the words "thence to such ports and places in any part of the world as the master may direct", the additional words "other than the United States."

The seaman having a legal obligation to serve for twelve months, if required by the respondents, there should be, we submit, the correlative obligation that the respondents under the rules should pay his wages during that time. Otherwise the seaman is placed in a position of unfair advantage.

The construction of the articles adopted by the Second Circuit would as the Court pointed out in *Shields* v. *U. S.*, 73 F. Supp. 862, 867 (D. C. E. D. Pa., 1947), permit the seamen to leave the ship at the first port in the United States after leaving Philadelphia,—obviously not the intention.

In *The Thomas Tracy*, 24 F. 2d 372 (C. C. A. 2, 1928), the Court stated, page 374: "The articles when in doubt are most strictly construed against the ship". There the period of employment was construed as one voyage, but this was to protect the seaman against a charge of desertion and was based on the seaman's own testimony that he believed the employment to be merely for one round trip.

The normal and usual course, however, is for the employment to continue after the round trip, *Labor Board* v. *Waterman S. S. Corp.*, 309 U. S. 206 (1939).

Even aside from the duties of the Admiralty Court as guardian of the rights of seamen, the Court will not, in the exercise of the equity powers which it has in admiralty, enforce a one-sided agreement. In *Moran* v. *Standard Oil Co.*, 211 N. Y. 187 (1914), Justice Cardozo stated, page 195:

> "The trial judge held that the contract imposed no obligation on the defendant to employ the plaintiff for five years, and that at the defendant's option it was terminable at will. We cannot accept that construction of its meaning. An intention to make so one-sided an agreement is not to be readily inferred. (Sanford v. Brown Brothers Co., 208 N. Y. 90.) The contract was drawn by the defendant's lawyers and was tendered to the plaintiff with the assurance, as he says, that his future for the next five years would be secure. Since the language is the defendant's we must construe it, if its meaning is doubtful, most favorably to the plaintiff."

The *Moran* case was followed with approval by the Second Circuit in the case of *Thomas A. Edison, Inc.* v. *Blackman Distributing Co.*, 66 F. 2d 722, 728 (1933); by the Third Circuit in the case of *A. M. Webb & Co., Inc.* v. *Robert P. Miller Co.*, 157 F. 2d 865, 868 (1946); by the Sixth Circuit in *Bach et al.* v. *Friden Calculating Machine Co., Inc.*, 155 F. 2d 361, 365 (1946); by the Eighth Circuit in *Marriman*

Medical Supply, Inc. v. *Ft. Dodge Serum Co.*, 47 F. 2d 458, 463 (1931).

The case of *O'Brien* v. *Miller*, 168 U. S. 287, 297-299 (1897), construing a bottomry bond is to the same effect.

In the single authority which the Second Circuit relied upon, *The Ipswich*, 46 F. 2d 136 (D. C. Md., 1930), the articles read, page 138:

> "• • • now bound from the Port of • • • Baltimore, Md., to Pacific Coast port via Atlanta Coastwise, and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge and/or loading port in the United States on Atlantic or Gulf Coast for a term of time not exceeding 12 calendar months."

The District Judge stated as to these articles, page 138:

> "Here the articles clearly call for a voyage from Baltimore to the Pacific Coast and back to a final port of discharge on the Atlantic Coast."

To us, *The Ipswich* articles are clearly different and inapplicable to our case. The Second Circuit's opinion neglects to give any effect whatever to the words "and such *other* ports and places in any part of the world as the Master may direct, and back to a final port of discharge and/or loading port in the United States on Atlantic or Gulf Coast". (Emphasis added.)

In any event, it is clear to us that the Circuit Court has resolved an ambiguity in libellant Farrell's articles in favor of the ship owners, whereas the decision should be directly to the contrary, the inferences arising from the ambiguity being construed as a matter of right against the author of the articles and in favor of the seaman.

Conclusion

We respectfully submit that Farrell has been clearly wronged by the misapprehension and misapplication of the applicable decisions of this Court; that his cause is just and that the principles of law involved are of considerable importance in the law of seamen generally; and that in view of the conflict of the decisions of the Circuit Courts on the subject, there is an apparent lack of harmony and uniformity in the law which only this Court can correct by a clarifying decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 267

WILLIAM FARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondents.

PETITIONER'S BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Summary Statement of Matter Involved	2
Maintenance and Cure	2
Wages	4
Basis of the Court's Jurisdiction	5
Questions Presented	5
Opinions of the Courts Below	6
Specification of Errors	6
The Argument	8
Point I—Maintenance and Cure	10
Point II—Wages	17
Conclusion	22

Table of Cases

Aguilar v. Standard Oil Co., 318 U. S. 724 14

A. M. Webb & Co., Inc. v. Robert P. Miller Co., 157 F. 2d 865 21

Bach, et al. v. Friden Calculating Machine Co., Inc., 155 F. 2d 361 21

Calmar S. S. Co. v. Taylor, 303 U. S. 525 ....3, 6, 8, 9, 10, 11, 12, 13

Enochasson v. Freeport Sulphur Co., et al., 7 F. 2d 674 ..... 18, 19

Harden v. Gordon, 11 Fed. Cases 480, 483 .....
Jennings v. Carson, 8 U. S. 2, 7 (1807) .....
Jones v. Waterman S. S. Corp., 155 F. 2d 992; aff. 318 U. S. 724 .....
Labor Board v. Waterman S. S. Corp., 309 U. S. 206 .....
Loverick v. Warner, 118 F. 2d 690; Cert. den. 313 U. S. 577 .....
Luksich v. Misetich, 140 F. 2d 812; Cert. den. 322 U. S. 761 .....
Marriman Medical Supply, Inc. v. Ft. Dodge Serum Co., 47 F. 2d 458 .....
Mason v. Evanisevich, 131 F. 2d 858 .....
Moran v. Standard Oil Co., 211 N. Y. 187 .....
O'Brien v. Miller, 168 U. S. 287 .....
Premeaux v. Socony-Vacuum Oil Co., 192 S. W. 2d 138 .....
Reed v. Canfield, Fed. Cases, No. 11641 .....11, 12,
Seville v. United States, 163 F. 2d 296 .....
Shields v. U. S., 73 F. Supp. 862 .....
Smith v. U. S., 167 F. 2d 550 .....
The Bouker No. 2, 241 F. 831 .....
The Ipswich, 46 F. 2d 136 .....
The J. F. Card, 43 F. 92 1
The Osceola, 189 U. S. 158 .....
The Thomas Tracy, 24 F. 2d 372 .....
Thomas A. Edison, Inc. v. Blackman Distributing Co., 66 F. 2d 722 .....

Table of Statutes

	PAGE
28 U. S. C. A., Section 1251	4
46 U. S. C. A., Section 572	18
46 U. S. C. A., Section 570	18
50 U. S. C. A., Appx., Section 1291	19
46 U. S. C. A., Section 566	13
46 U. S. C. A., Section 713, Table A	20
50 U. S. C., Appx., Section 1292(c), 58 Stat. 758, Ch. 451, Sept. 30, 1944	15, 17

Authorities

Peters' Admiralty Decisions, Vol. 1	15, 16
Cyc. of Am. Biog., Vol. 12, page 235	17
War Shipping Administration Reg. 108, July 18, 1945	15
35 C. F. R., 1945 Supp., 35.011 (13)	15
House Rep. #1232, 78th Cong., 2d Sess.	15, 17
Senate Rep. #1140, 78th Cong., 2d Sess.	15, 17

Appendix

Les Us et Coutumes de la Mer, title page	25
Jugemens d'Oleron, pp. 25, 26	25
Translation	26
Note, dictionary definition of bread	28
Certificate of translator	30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 267

WILLIAM FARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondents.

PETITIONER'S BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner William Farrell urges a review by this Court of the law governing his cause for maintenance and cure and for wages. Petitioner does not urge review of the law or facts relating to his cause for negligence. The facts of the case on the issues of maintenance and cure and wages are not in dispute (R. 11, 21). We therefore summarize only those facts relating to the issues of maintenance and cure and wages.

Summary Statement of Matter Involved

Maintenance and cure. Farrell on October 15, 1942, enlisted in the United States Navy, and also and on the same day joined the American Merchant Marine. He received training at the United States Merchant Seaman's Training School at Hoffman Island, New York. (R. 26).

During the course of his wartime service in the Merchant Marine, and while temporarily in a replacement pool for seamen at Naples, Italy, and on December 16, 1943, Farrell signed on the "S. S. James E. Haviland" as a seaman with the grade of oiler. The "Haviland" was owned and operated by the United States with the Luckenbach Steamship Company as general managers. Farrell was then about twenty-two years old (R. 36, 26, 27).

On February 5, 1944, while the "Haviland" was docked at Palermo, Italy, Farrell received shore leave late in the afternoon and left the ship with three companions. Palermo was then in a damaged condition following its capture from the enemy. The invasion of Italy was then in progress, and dimout or blackout regulations were required (R. 37, 13, 14).

Farrell started to return to the "Haviland" with another seaman about eight o'clock that evening. It was dark and raining and they became lost in the city but were directed to the port area by a local policeman. They arrived at Gate 1 of the area which was about a mile distant from Gate 5, the gate by which they had left and which they were trying to find. They were admitted to the port area through Gate 1 upon presentation of their passes to the sentry on duty and endeavored to make their way to the ship (R. 37, 14).

While Farrell and his companion were walking along a muddy road in the semi-darkness on opposite sides of the road in order to be safe from approaching vehicles running

with dimmed or no lights, Farrell fell into a graving dock (R. 37, 14).

From the time of the accident until June 30, 1944, Farrell was in several government hospitals, and on that date he was discharged at Norfolk, Virginia, as "completely disabled" (R. 42, 21).

At the time of the trial, June 10-12, 1947 (R. 34), it was shown that as a result of the fall, Farrell sustained multiple and compound fractures of the skull and became permanently blind and subject to recurring pain, especially in his head. It was also found that he suffered from convulsive attacks coming from traumatic epilepsy, the result of the skull fracture, which may well become worse as he grows older (R. 21, 15, 38). He was always a healthy individual before this accident (R. 21).

Both of the lower courts held that Farrell would continue to need treatment and medical care from time to time to alleviate his attacks of headaches and epileptic convulsions, and that these may grow worse (R. 43, 21).

Farrell was awarded what he had spent for medical treatment and medicines up to the date of trial and in addition was allowed maintenance to December 30, 1944, equivalent to six months after his discharge from the Norfolk hospital, as the full measure of the responsibility of the respondents for Farrell's maintenance and cure (R. 42, 25).

The District Court's conclusion of law which the decision of the Circuit Court in effect affirms, states "The maximum cure possible for libellant's condition having been effected, libellant is not entitled to any further allowances for maintenance and cure" (R. 34).

It is believed that Farrell is entitled to "a more liberal application of the rule" of maintenance and cure as stated in the *Calmar* case, 303 U. S. at page 530.

Wages. After his period of training Farrell shipped on the "S. S. Johns Hopkins", owned and operated by the United States, as an oiler on September 15, 1943. He left the "Hopkins" at Naples, Italy, to enter a hospital for ten days and was then assigned to the replacement pool in Naples (R. 36, 26).

The rate of pay received by Farrell on the "Hopkins" was $110 per month and when he later signed on the "Haviland" at Naples on December 16, 1943, he signed on in the same grade of oiler and with the same rate of pay. He was so engaged at the time of his accident on February 5, 1944, which completely disabled him (R. 36, 26). The controversy in this case arises with respect to his wages due from the "Haviland" only.

The shipping articles on the "Haviland", the Circuit Court stated,[*1] provided (R. 40):

> "It is agreed between the master and seamen * * * of the S.S. James E. Haviland * * * now bound from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the master may di-

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[*1] Exhibit 3, the copy of Farrell's shipping articles on the SS. James E. Haviland, introduced at page 48 of the typewritten Record (see stipulation, R. 44), states:

> "* * * now bound from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months.[2]

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[2] If these words are not necessary they must be stricken out. * * *"

rect * * * and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months."

The shipping articles it will be noted did not use the word "voyage" but both courts below concluded that the "voyage" of the "Haviland" ended May 28, 1944, and that Farrell was entitled to wages only until that time (R. 40, 25). Farrell claims to be entitled to his wages for the full twelve months of his contract or until December 16, 1944.

The Basis of the Court's Jurisdiction

The jurisdiction of this Court is based upon Title 28, U. S. C. A. Section 1254.

The date of the judgment sought to be reviewed is May 10, 1948 (R. 290). A petition for a rehearing was entertained by the Circuit Court and denied on June 11, 1948 (R. 296).

Petition for writ of certiorari was granted by this Court on November 22, 1948.

Questions Presented

(1) Was there a correct interpretation by the Circuit Court of Appeals in this case of the rule of maintenance and cure as applied to a seaman injured in the wartime service of his ship and resulting in permanent and total disability?

(2) Is the petitioner, a seaman injured in the wartime service of his ship resulting in permanent and total disability and admittedly in need of medical care from time to time, entitled to "a more liberal application of the rule" of maintenance and cure than he received in this case?

(3) Did the Circuit Court properly construe the petitioner's term of service as stated in his shipping articles?

(4) Was the seaman Farrell deprived of the benefit of the provisions contained in 46 U. S. C. A. Sections 572, 570?

Opinions of the Courts Below

The opinion of the Circuit Court of Appeals for the Second Circuit in this case is reported at 167 F. 2d 781. The opinion of the District Court for the Southern District of New York appears in the record at pages 10-25.

Specification of Errors

(1) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

> "Generally speaking, however, the duty of the ship owner to provide maintenance and cure for the seaman 'does not extend beyond the time when he is as completely cured as he ever can be'" (R. 41).

(2) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

> "It is sufficient to say here that, even if the appellant's injuries were 'caused' by his 'employment', we think the general rule applicable" (R. 41).

(3) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

> "Were it not for the above quoted language in the *Calmar* case we would have no hesitancy in affirming the decree below. That language, however—in conjunction with the fact that the reversal of the decree was 'without prejudice to any later suit by respondent

to recover maintenance and cure to which he may then be entitled'—is conceivably susceptible to the interpretation that, though the seaman is as cured as he ever can be, he may still recover such amounts as are needed in a definitely ascertainable period in the immediate future to provide care of a clearly determinable kind. But if this interpretation were the correct one, the language would seem to be inconsistent with that on page 530 of the opinion stating in effect that the duty to provide maintenance and cure ends when the seaman is as completely cured as he ever can be. We take it, therefore, that, though Taylor, the seaman in the *Calmar* case, was affected with an 'incurable malady', he was not at the time of the trial as cured as he could ever possibly be. Indeed, the Court said, 'Care and treatment at frequent intervals, with periodic medical observation of the patient, are of aid in *arresting its (the disease's) progress.*' *Page 526.* Moreover, as the Circuit Court of Appeals stated, 92 F. 2d 84, 87, the incurable disease from which Taylor suffered was 'of a progressive nature' so that it could not be said that 'the ordinary means which medical science affords for the treatment and care of this disease will be exhausted prior to his death.' Here that is not the case" (R. 42).

(4) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

"To allow the appellant his wages in full to the end of the voyage only instead of for a full year was also correct" (R. 40).

(5) The Circuit Court of Appeals for the Second Circuit erred in making the following ruling:

"The voyage was to end in the United States and did end there at the Port of New York on March 28, 1944.

It seems clear that the agreement was for employment for the duration of the voyage only and not for twelve months, the cause, 'for a term of time not exceeding 12 (twelve) calendar months', serving to limit the period for which the appellant was employed, not to extend it beyond the end of the voyage" (R. 40).

THE ARGUMENT

POINT I

Farrell's case being that of injuries received in the wartime service of the ship, the Court should apply a more liberal rule of maintenance and cure than merely that to such time as he is as completely cured as he ever can be.

The difficulty here is in the application of the law laid down in the *Calmar* case, 303 U. S. 525 (1938).

In the *Calmar* case, Mr. Justice Stone writing for the Court considered the point left open in the case of *The Osceola*, 189 U. S. 158 (1903), as expressed in the rule, stated on page 175:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, *at least* so long as the voyage is continued." (Emphasis supplied.)

and was applying this law to the case of an incurable disease manifesting itself during the employment, but not caused by it. The seaman had stubbed his toe in the engine room and had alleged that that accident was the cause of his disease known as Buergers Disease, and the Trial Court had held and the Supreme Court had agreed, page 529, that the disease was not caused by the injury to his foot.

Two classes of chronic cases were discussed in the *Calmar* case and were described at page 529 as:

(1) where "the efficient cause of the injury or illness was some proven act of the seaman in the service of the ship";

(2) where "it was deemed enough that he was incapacitated when subject to the call of duty as a seaman, and that his incapacity continued after the voyage had ended."

The Court then states the question involved as follows, page 530 (clearly referring to the second class):

> "There remain the questions whether in the case of a chronic illness the duty continues so long as medical attendance and care are beneficial, until death if the need lasts so long, and whether a lump sum may be awarded to defray the cost of meeting the anticipated need."

The Court then refers to both classes of cases and states the rule applicable to each class. In stating the rule applicable to class (1), the Court stated at page 530:

> "In answering the first we lay to one side those cases where the incapacity is caused by the employment. As to them considerations not present here may apply, which might be thought to require a more liberal application of the rule than we think is called for in this case."

In stating the rule applicable to class (2), the Court states at page 530:

> "We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be

> expected to result from nursing, care, and medical treatment. This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service."

But the Court modifies this stand as to the rule applicable to class (2) in a concluding paragraph, page 531, where it is stated:

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

If this is so, i.e., if the classes of maintenance and cure cases referred to in the *Calmar* case and the rules applicable thereto are as we have stated them, then it can not be true as the Circuit Court has stated in its opinion of May 10, 1948 (R. 41), that "It is sufficient to say here that, even if the appellant's injuries were 'caused' by his 'employment,' we think the general rule applicable."

It can not be true, because the Supreme Court took the pains to state the two classes and the different rules applicable to each.

The words on page 531 of the *Calmar* case, reading "The seaman's recovery must therefore be measured in each case * * *" are doubtless the words that lead the Circuit Court to adopt the interpretation that the Supreme Court was announcing one rule for both classes of cases. It is submitted, however, that the Supreme Court was merely referring to each case of the latter class of cases mentioned, to wit, "incapacitated when subject to the call of duty as a seaman * * * incapacity continued after the voyage * * *"

or as later and more specifically defined "the incurable disease which manifests itself during his employment but is not caused by it."

The Supreme Court had "laid aside" the first class of cases of "proven acts of the seaman in the service of the ship," or as later referred to "where the incapacity is caused by the employment" as to which "a more liberal application of the rule" might be called for.

We submit that the Supreme Court was referring to just such an injury as Farrell sustained in this case and was distinguishing it from the disease, bodily infirmity and sickness cases, and other cases not "incurred" in the service of the ship,—cases which manifest themselves during the employment but are not caused by it, such as the Court had before it in the *Calmar* case.

This is clearly shown by the three cases the Supreme Court referred to, middle of page 530. In the first of these cases, *Reed* v. *Canfield*, Fed. Cases, No. 11641 (Circuit Court Mass., 1832), the injuries consisted of frozen feet causing amputation of the toes, and were due to the seaman being blown out to sea in a small boat while returning from shore to the ship, a whaler. Judge Story decided in this case that the injuries were received in the service of the ship and affirmed an award of maintenance and cure incurred during the year between the time of the injury and the trial.

In the case of *The J. F. Card*, 43 F. 92 (D. C. E. D. Mich., 1890), referred to by the Supreme Court, the case was that of injuries apparently not chronic, consisting of a capsular fracture or bruise sustained by the libellant being hit by a boom and falling to the deck, while reefing a mainsail on the ship on Lake Erie. There was no question raised as to whether the injury was caused by the employment. The only question was as to the duration of the maintenance and cure. The Court reduced an award of seven weeks'

maintenance and cure and allowed only physicians' fees and return fare, pointing out that the seaman could have been treated, free of expense to himself and the owners of the ship, at a marine hospital and stating that the rule adopted in *Reed* v. *Canfield* was for the protection of seamen on long ocean voyages and not to the short trips customary in Great Lakes shipping.

The third and last case referred to by the Supreme Court was a case from the Second Circuit, *The Bouker No. 2*, 241 F. 831 (1917), and was a case of pneumonia, the seaman having felt unwell a few days before he had declared himself too sick to work and had left his ship and gone home. The seaman was an engineer on a steam tug hauling garbage scows, and making two trips per day in good weather, at a stipend per week amounting to about $100.00 per month, plus food and quarters while on the tug. The Court allowed maintenance and cure for as long as "he would have remained in the marine hospital had he gone there." Judge Hough stated in this case that the limits of cure or care must always depend upon the facts of each particular case. The seaman had sued in *forma pauperis* and had alleged negligence because of the dampness and unwholesome condition of the sleeping quarters. The libel was not sustained on the negligence, but the owners of the steam tug appealed the award of maintenance and cure. The seaman had apparently recovered at the time of trial.

All three of these cases relied upon by the Supreme Court in the *Calmar* case seem to us, therefore, to be cases where the incapacity was caused by the employment and, therefore, the meaning of the Supreme Court's opinion must have been that the different and more liberal rule referred to applied to that class of cases.

The citation by the Second Circuit of the case of *Luksich* v. *Misetich*, 140 F. 2d 812 (C. C. A. 9, 1944), with denial of certiorari, 322 U. S. 761, as the sole authority of the Court's ruling allowing maintenance and cure only to such

time as the seaman is as cured as he ever can be, would seem to indicate that the Second Circuit considered the denial of the certiorari as indicating a retraction or change of opinion by the Supreme Court as to the view stated in the *Calmar* case.

The *Luksich* case, however, would seem to be insufficient authority for this proposition, because the seaman there was a fisherman who had signed an agreement to fish on shares for the tuna season only,—a short season. This would, therefore, be a special case, as pointed out in *The J. F. Card* and *The Bouker No. 2, supra*. See also the statutory provision in *U. S. C. A., Title 46*, Sect. 566, making the share fisherman a special case.

It also seems that the Ninth Circuit did not consider the *Luksich* case authority for situations like that of the case at bar, because in the later case of *Seville* v. *United States*, 163 F. 2d 296, 299 (1947), a case of fractures of bones in the hand and wrist sustained while unloading ship, in which negligence was not established, the statement in the *Luksich* case is referred to as dictum.

Furthermore, the only other citation of the *Luksich* case, other than the one just cited and in the case at bar, is by the Supreme Court of Texas in the case of *Premeaux* v. *Socony-Vacuum Oil Co.*, 192 S. W. 2d 138 (1946), in a death action, and by way of dictum.

Even if the case at bar were a case of the second class, to wit, an incapacity manifesting itself during the employment but not caused by it, it is submitted that too harsh a rule has been applied by applying the criteria of *improvement* rather than of *benefit*, or at least, of *need*. All three of these criteria are found in the quotations from the *Calmar* case, *supra*.

Circuit Judge Clark, by way of a strong dissenting opinion in the case of *Loverich* v. *Warner*, 118 F. 2d 690, 697, (C. C. A. 3, 1941), took issue as to whether the criteria

should be improvement, as he concluded, or benefit, as the majority of the Court had held. With this strong dissent in its favor, a petition for certiorari was presented to the U. S. Supreme Court and certiorari was denied, 313 U. S. 577.

The *Loverich* case was that of a throat-cancer manifesting itself during employment, but not claimed to be caused by it and, although as the Court pointed out, there was some question about it, this case therefore may be taken as a case of the second class. If this liberal rule of benefit applies to the second class of cases, then *a fortiori*, it would apply to the first class, as to which a more liberal rule is required.

The Circuit Court stated as a fact, in its opinion (R. 43), that "the appellant will from time to time require some medical care to alleviate his attacks." Certainly by alleviating his attacks, he would benefit, and who is to say that such alleviation is not "needful", particularly as to a seaman, a ward of the Court?

We do not argue at length the question as to whether the injuries to Farrell were caused by the employment as we consider from the Circuit Court's opinion that the Circuit Court was fairly well persuaded that they were.

We regard the underlying facts as settled by the holding of the Circuit Court (R. 41), that Farrell was "on shore leave in the process of returning to his ship" and that he was not injured "as a result of intoxication or other wilful misbehaviour."

The facts being as found, the case appears to us to be on all fours with *Reed* v. *Canfield, supra*, and amply supported by *Aguilar* v. *Standard Oil Co.* (Case No. 454), 318 U. S. 724, 726, 736 (1943). See also *Smith* v. *U. S.*, 167 F. 2d 550 (C. C. A. 4, 1948).

As to the amount of the recovery to which we believe Farrell entitled, the District Court awarded maintenance

for only six months after leaving the hospital at Norfolk, Virginia on June 30, 1944 (R. 42), at the rate of $3.50 per day (R. 13, 25).** Trial of the action having been on the 10th, 11th and 12th days of June, 1947 (R. 34), it is submitted that at the least and under the rulings of the *Calmar* case and *Reed* v. *Canfield, supra*, cases, less meritorious than Farrell's, Farrell should have had maintenance for the remaining 17 months and 10 days before the trial. In addition we believe Farrell should have maintenance paid to him at regular intervals in the future as long as his need continues.

"For as long as such disability * * * exists," was the standard adopted by 50 U. S. C. § 1292(e); 58 Stat. 758, Ch. 451, Sept. 30, 1944; House Rep. #1232, 78th Cong., 2d Sess.; Senate Rep. #1140, 78th Cong., 2d Sess.

As to the question of maintenance and cure for life as claimed in the libel, this question was also raised in *Reed* v. *Canfield, supra,* as Judge Story noted, page 429. In answering this question the learned Justice refers to Cleirac, Judgmens d'Oleron, arts. 6 and 7 and notes by Cleirac; Consolato del Mare, c. 182, c. 137; 2 Pard. Coll. Mar. 152, with apparent approval and states that such case may well be left for decision when it shall arise directly in judgment.

A translation of Cleirac's notes referred to by Judge Story is found in the work of Judge Peters, "*Peters Admiralty Decisions*, 1792-1806" a two volume work. Judge Story cites it with approval in his earlier opinion in *Harden* v. *Gordon*, 11 Fed. Cases 480, 483, 485 (Case No. 6047, Cir. Ct., D. Maine, 1823), as well as in *Reed* v. *Canfield*, p. 428. The translation (appearing in Vol. 1, Appendix,

** War Shipping Administration Reg. 108 dated July 18, 1945 allowed that sum even in cases of injuries occurring before the date of the Regulation.

A veteran who has suffered blindness in both eyes rendering him so helpless as to be in need of regular aid and attendance, at the time of this award, was entitled to a monthly pension of $235.00 [35 CFR, 1945 Supp., 35.011 (13)].

p. xv, and identified as Cleirac's in Vol. 1, Appendix, pp. iii, iv) states:

> "If in defending himself or fighting against an enemy or corsairs, a mariner is maimed, or disabled to serve on board a ship for the rest of his life, besides the charge of his cure, he shall be maintained as long as he lives at the cost of the ship and cargo. Vide the Hanseatic Law, Art. 35."

Art. 35 of the Laws of the Hanse Towns referred to in the commentary also appears in Judge Peters' work, Vol. 1, Appendix, p. civ:

> "Art. xxxv. The seamen are obliged to defend their ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of the concerned in a common average. If anyone of them is maimed and disabled he shall be maintained as long as he lives by a like average."

Concerning the source of the commentaries on the sea laws appearing in his work, Judge Peters states, Vol. 1, Appendix, p. iv:

> "The 'notes and illustrations' which are highly valuable, will be found by a reference to Cleirac, to have been principally abridged from his work, and indeed, in some instances they are extracted verbatim. * * * their real author (Cleirac) * * * is justly estimated among the most distinguished jurists of France."

Judge Richard Peters who published "*Peters' Admiralty Decisions*" was a Register of Admiralty from 1771 to the beginning of the Revolutionary War. After the War, he refused a proffered appointment by Washington as Comptroller of the Treasury to accept the position of Judge of the District Court of Pennsylvania from 1792 until his death in 1828 (Nat. Cyc. of Am. Biog., Vol. 12, p. 235).

In *Jennings* v. *Carson*, 8 U. S. 2, 7 (1807), Judge Peters declined to follow the law of England in a prize case and pointed out that admiralty proceeds by a law which considers all nations as one community. The decision of Judge Peters was affirmed and his opinion was reprinted in full in the opinion as "too important to be omitted."

There is, we recognize, a question of the interpretation of this application of Art. VI of the laws of Oleron, by Cleirac, as approved by Judges Story and Peters. Was Farrell injured fighting the enemy? The record shows that Farrell enlisted in the United States Navy on October 15, 1942, and at the same time, *i. e.*, same day and same office, that he enlisted in the Merchant Marine (R. 26, Typewritten, R. 43). That Farrell did so out of the highest patriotic motives can not be doubted, especially in view of the fact that previously thereto he was working on the B. & O. Railroad (Typewritten, R. 43), a job in which his chance of remaining on a deferred status was excellent. His wages there, furthermore were higher, *i. e.*, at least $200 per month (Typewritten R. 44).

"From causes relating to the war effort," was all that was required by 50 U. S. C. § 1292(c), *supra*.

POINT II

The petitioner should have been allowed wages for the full twelve months stipulated in his shipping articles.

The pertinent portions of Farrell's shipping articles are quoted in the opinion of the Circuit Court (R. 40), and *supra*, page 4.

It will be noted that the Circuit Court in its opinion erroneously used the word "voyage" as though the word "voyage" were contained in that agreement, whereas the fact is that it is not; but also and more important apparently refers to that word as having some well defined and

understood meaning, not explained by the Circuit Court. It is submitted that the term "voyage" is used in various senses and properly refers to the whole term of the mariner's employment, *Enochasson* v. *Freeport Sulphur Co., et al.*, 7 F. 2d 674, 675 (D. C. S. D., Texas, 1925), and that if this is so, there was manifest error in the decision.

A much more serious error, however, appears in the Circuit Court's decision on the subject of wages. The only words in the shipping articles covering the term, as distinguished from the place of the employment, are those reading "for a term of time not exceeding 12 (twelve) calendar months".

U. S. Code, Title 46, Section 572, states:

> "A master of a vessel in the foreign trade may engage a seaman at any port in the United States, in the manner provided by law, to serve on a voyage to any port, or for the round trip from and to the port of departure, or for a definite time, whatever the destination. The master of a vessel making regular and stated trips between the United States and a foreign country may engage a seaman for one or more round trips, or for a definite time, or on the return of said vessel to the United States may reship such seaman for another voyage in the same vessel, in the manner provided by law."

U. S. Code, Title 46, Section 570, states:

> "Every master of a merchant vessel who engages any seaman at a place out of the United States, in which there is a consular officer shall, before carrying such seaman to sea, procure the sanction of such officer, and shall engage seamen in his presence; and the rules governing the engagement of seamen before a shipping commissioner in the United States, shall apply to such engagements made before a consular officer; and upon

> every such engagement the consular officer shall indorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence, and otherwise duly made."

It is only as an agreement for employment for 12 (twelve) calendar months, therefore, that this agreement meets the statutory requirements, *i. e.*, "for a definite time."

The Clarification Act, U. S. Code, Title 50, Appx. Section 1291, gives to seamen employed through the War Shipping Administration the rights of seamen on privately owned and operated vessels.

The Circuit Court of Appeals, Second Circuit, refused to recognize as authority the previous decision of the Third Circuit in *Jones* v. *Waterman S. S. Corp.,* 155 F. 2d 992 (1946, affirmed 318 U. S. 724), upon the ground that the agreement there involved covered one or more voyages as the master might direct within a limited term. The authority upon which the Third Circuit relied in the *Jones* case, however, that of *Enochasson* v. *Freeport Sulphur Co., et al.,* 7 F. 2d 674 (D. C. S. D. Texas, 1925), contains a long and learned discussion of the subject.

The shipping articles in the *Enochasson* case provided for:

> "Trading to or between the United States and the Republic of Mexico or the West Indies as the master may direct and such other ports or places in any part of the world as the master may direct and back to a final port of discharge in the United States for a term of time not to exceed six calendar months."

These articles, therefore, were very similar to those at bar in providing for going to "such other ports or places in any part of the world as the master may direct."

The libellant in the *Enochasson* case had served on the vessel for three months and ten days and had made several

voyages between Mexico and Texas and Cuba and Texas. He was awarded wages for the full six months. The *Enochasson* case was also cited and followed by the Ninth Circuit in the later case of *Mason* v. *Evanisevich*, 131 F. 2d 858 (1942).

The articles as they are written by the respondents relating to the description of the voyage (U. S. C. A. Title 46, Sect. 713, Table A), and using the construction put upon them by the Circuit Court of Appeals for the Second Circuit, would permit the employer to terminate the employment when the seaman falls ill or is injured, in the next port of discharge in the United States, or to continue on if the seaman were then able to serve,—certainly a one-sided contract.

The construction adopted by the Circuit Court of Appeals also requires a reading into the articles, after the words "thence to such ports and places in any part of the world as the master may direct", the additional words "other than the United States."

The seaman having a legal obligation to serve for twelve months, if required by the respondents, there should be, we submit, the correlative obligation that the respondents under the rules should pay his wages during that time. Otherwise the seaman is placed in a position of unfair advantage.

The construction of the articles adopted by the Second Circuit would as the Court pointed out in *Shields* v. *U. S.*, 73 F. Supp. 862, 867 (D. C. E. D. Pa., 1947), permit the seamen to leave the ship at the first port in the United States after leaving Philadelphia,—obviously not the intention.

In *The Thomas Tracy*, 24 F. 2d 372 (C. C. A. 2, 1928), the Court stated, page 374: "The articles when in doubt are most strictly construed against the ship." There the period of employment was construed as one voyage, but this was to protect the seaman against a charge of deser-

tion and was based on the seaman's own testimony that he believed the employment to be merely for one round trip.

The normal and usual course, however, is for the employment to continue after the round trip, *Labor Board* v. *Waterman S. S. Corp.*, 309 U. S. 206 (1939).

Even aside from the duties of the Admiralty Court as guardian of the rights of seamen, the Court will not, in the exercise of the equity powers which it has in admiralty, enforce a one-sided agreement. In *Moran* v. *Standard Oil Co.*, 211 N. Y. 187 (1914), Justice Cardozo stated, page 195:

> "The trial judge held that the contract imposed no obligation on the defendant to employ the plaintiff for five years, and that at the defendant's option it was terminable at will. We cannot accept that construction of its meaning. An intention to make so one-sided an agreement is not to be readily inferred. (Sanford v. Brown Brothers Co., 208 N. Y. 90.) The contract was drawn by the defendant's lawyers and was tendered to the plaintiff with the assurance, as he says, that his future for the next five years would be secure. Since the language is the defendant's we must construe it, if its meaning is doubtful, most favorably to the plaintiff."

The *Moran* case was followed with approval by the Second Circuit in the case of *Thomas A. Edison, Inc.* v. *Blackman Distributing Co.*, 66 F. 2d 722, 728 (1933); by the Third Circuit in the case of *A. M. Webb & Co., Inc.* v. *Robert P. Miller Co.*, 157 F. 2d 865, 868 (1946); by the Sixth Circuit in *Bach et al.* v. *Friden Calculating Machine Co., Inc.*, 155 F. 2d 361, 365 (1946); by the Eighth Circuit in *Marriman Medical Supply, Inc.* v. *Ft. Dodge Serum Co.*, 47 F. 2d 458, 463 (1931).

The case of *O'Brien* v. *Miller*, 168 U. S. 287, 297-299 (1897), construing a bottomry bond is to the same effect.

In the single authority which the Second Circuit relied upon, *The Ipswich*, 46 F. 2d 136 (D. C. Md., 1930), the articles read, page 138:

> "* * * now bound from the Port of * * * Baltimore, Md., to Pacific Coast port via Atlanta Coastwise, and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge and/or loading port in the United States on Atlantic or Gulf Coast for a term of time not exceeding 12 calendar months."

The District Judge stated as to these articles, page 138:

> "Here the articles clearly call for a voyage from Baltimore to the Pacific Coast and back to a final port of discharge on the Atlantic Coast."

To us, *The Ipswich* articles are clearly different and inapplicable to our case. The Second Circuit's opinion neglects to give any effect whatever to the words "* * * and such *other* ports and places in any part of the world * * *." (Emphasis added.)

In any event, it is clear to us that the Circuit Court has resolved an ambiguity in petitioner Farrell's articles in favor of the ship owners, whereas the decision should be directly to the contrary, the inferences arising from the ambiguity being construed as a matter of right against the author of the articles and in favor of the seaman.

Conclusion

We respectfully submit that Farrell has been clearly wronged by the misapprehension and misapplication of the applicable decisions of this Court; that his cause is just and that the principles of law involved are of considerable importance in the law of seamen generally; and that in view of the conflict of the decisions of the Circuit Courts on the

subject, there is an apparent lack of harmony and uniformity in the law which only this Court can correct by a clarifying decision; that Farrell should have maintenance for life for as long as his need continues, and wages for the full twelve months of the obligation stated in the articles.

Respectfully submitted,

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Silas Blake Axtell,
Myron Scott,
of Counsel.

APPENDIX

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LES USAGES ET COUTUMES DE LA MER.

DIVISE'ES EN TROIS PARTIES.

I. De la Navigation.
II. Du Commerce Naval, & Contrats Maritimes.
III. De la Jurisdiction de la Marine.

Avec un Traitté des Termes de Marine, Reglemens de la Navigation des Fleuves & Rivieres ; Et les nouveaux Edits, Reglemens, Arrests & Jugemens rendus sur le fait du Commerce de la Mer.

A ROUEN,
Chez EUSTACHE VIRET, dans la Cour du Palais.

M. DC. LXXI.
Avec Privilege du Roy.

bleſſoient, où l'on leur fit choſe grevante, ils doivent eſtre gueris & penſez ſur le couſt de ladite Nef.

1. *Le Maître peut chaſſer, & mettre hors les Matelots quereleux, notamment l'agreſſeur & ſes complices.*
2. *Matelot bleſſé en faiſant ſervice au Navire, ou au Maître, doit eſtre bien traité, penſé & medicamenté aux dépens du Navire.*
3. *Si le Matelot eſt bleſſé, combatant pour la conſervation du Navire & marchandiſe, le traitement d'iceluy ſera Avarie groſſe.*
4. *Arreſt de la Cour de Parlement de Bourdeaux, en la cauſe de Fiton, pris & mené captif par les Turcs, en faiſant ſervice à ſon Maître.*

1. SI les Matelots s'enyvrent, font des querelles, ſe battent & ſe bleſſent, le Maître peut chaſſer & mettre hors les riotus, notamment l'agreſſeur, & ſes adherans ou complices, que ce jugement nomme *Son ſecours*. L'Agreſſeur eſt *princeps delicti, & ei omnia imputantur, l. quoniam multa facinora. C. ad legem Iuliam, De vi publica.* Et en ſortant leur doit faire rendre tout ce qu'ils ont receu : en outre, il leur fera rembourſer ce qu'il luy faudra bailler de plus que leurs gages, aux autres qu'il prendra en leur place. *VVubuy Art. 18. Charles Quint Article 23. & ſuivans*, leſquels ſtatuënt & ordonnent certaines peines proportionnées à la gravité des peccadiles, & fautes commiſes par les Matelots.

2. Que ſi le Matelot faiſant ſon devoir, & rendant ſes ſervices au Maître & au Navire, eſt bleſſé & reçoit dommage, il doit eſtre penſé, medicamenté, bien traité, & du tout indemnisé aux dépens du Navire. *VVubuy Article 18. Hanze. Theuton. Art 39. Charles Quint. Art. 27. & 28. Philippe II. Roy des Eſpagnes Art. 16.* Et ſi le Matelot faiſant ſervice eſt pris par les Fourbans, le Maître eſt tenu de le redimer, & en outre luy payer ſon loyer, tout ainſi que s'il avoit continué de ſervir pendant ſa captivité. *Conſulat chap. 182.*

3. Et ſi en ſe défendant, ou combatant contre l'ennemy ou les Fourbans, il eſt mutilé ou rendu perclus & inhabile à travailler le reſte de ſa vie ; outre les penſemens, il aura du pain tant qu'il vivra aux

dépens du Navire & de la cargaiſon, & c'eſt *Avarie groſſe. Mynsing. Theut. Art. 35. Charles Quint Art. 27. & 28. Arg. legis ſecundum Iulianum, & ibi Barth. & l. cum duobus. §. quidam, D. Pro ſocio. Solent enim æſtimati naves & quæ in naui ſunt, atque ex his ſummæ conflari ad damna quæ eveniunt, in quibus ſunt & vectorum impendia, ferantur à Dominis navium & mercium pro parte quam habent in ea ſumma; & hæc ipſi Iuri naturæ ſunt conſentanea Hugo Grotius. De Iure Pacis & Belli lib. 2. cap. 12. num. 21.* Iugement d'Oleron quatriéme.

4. En l'an 1621. Gilles Eſteben, Bourgeois & Marchand de Bourdeaux, chargea vne barque de trente-ſix Tonneaux de Vin pour Calais, & prépoſa à la conduite ſon ſeruiteur nommé Piton: la Barque étant ſortie hors la riviere de Bourdeaux, en pleine mer fut rencontrée d'un Navire fourban Turc, qui leur court ſus, les contraint d'amener; & enfin les ayant pris, les Pirates laiſſent la Barque & le Vin, dautant que, par Religion, les Turcs ne boivent pas de Vin, quoy que ce ſoit, n'en font pas marchandiſe, l'Alcoran leur défend: ou à l'aventure que les Fourbans étoient d'intelligence avec le Maître de la Barque, lequel étoit Ecoſſois, car les Turcs ne luy firent point d'autre outrage, ny à ſon équipage, mais ils ſe ſaiſirent du ſeul Piton, & l'emmenerent captif en Barbaie, où il fut vendu, & demeura quatre ans & demy en eſclavage, en grand miſere & pauvreté: enfin Piton eſt racheté d'aumônes en l'an 1625. & fut payé pour ſon rachapt ou rançon la ſomme de ſept cens quatre-vingt livres.

Piton revenu à Bourdeaux, trouve que ſon Maître Gilles Eſteben eſtoit decedé, il fait action à ſa vefve devant les Iuges & Conſuls de la Bourſe, & demande ſes ſalaires, tant pour le temps precedent à ſa captivité, que pour le temps qui a couru pendant ſa detention & ſon eſclavage: en outre le rembourſement de ſa rançon, & ſes dommages & intereſts: la vefve d'Eſteben decline, & demande ſon renvoy devant les Iuges Preſidiaux de Guyenne, les Iuges Conſuls l'en deboutent, appel en la Cour, & Requeſte en évocation du principal.

La Cour oüy Corbies pour l'Appellante; Du Mantet pour Piton intimé, a mis l'appel, & dont a eſté appellé au neant: évoquant & retenant le principal de la Cauſe, & faiſant Droit aux Parties, a condamné & condamne la Partie de Corbies, payer à la Partie de Mantet pour tous ſalaires, rachapt & rançon, dépens, dommages & intereſts, la ſomme de mil livres, ſans autres dépens, le dernier Aouſt 1630. Monſieur Dalis Preſident.

Ce qui eſt conforme aux Arreſts du Parlement de Paris cités par Mornac. *ad legem. inter cauſas. §. non omnia. D. mandati*, & contre

Appendix

USES AND CUSTOMS OF THE SEA.

DIVIDED INTO THREE PARTS.

I—Navigation.

II—Naval Commerce and Maritime Contracts.

III—Marine Jurisdiction.

With a treatise on marine terms; regulations governing the navigation of rivers and streams, and the new edicts, regulations, decrees and decisions rendered in connection with sea trade.

Translator's Note: Written by hand: By Etienne Cleirac Chaingy.

ROUEN

at EUSTACHE VIRET, In the Court of the Palace.

1671

With privilege of the King.

OF OLERON.

* * * wounded or if harm is done to them they must be cured and treated at the expense of the said vessel.

1. The Master may discharge and put off the quarrelling seamen in particular the aggressor and his accomplices.

2. A Seaman who has been wounded while doing his duty to the vessel or to the Master must be well treated, attended to and given medicines at the cost of the vessel.

3. If the seaman is wounded while fighting for the conservation of the vessel and of the merchandise, his treatment shall be considered as general average.

4. Decree of the Court of the Parliament of Bordeaux in the matter of Fiton, who was captured and taken into captivity by the Turks while serving his Master.

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1. If the seamen get drunk, quarrel, fight or wound one another, the Master may chase and put off those rioting seamen in particular the aggressor and his assistants or accomplices whom this Decision calls "his assistants". The aggressor is "princeps delicti and ei omnia imputantur", l' "quoniam multa facinora, C. ad legem Iuliani, De vi publica".

And when they leave they must render an account of everything they received. Furthermore, they must be made to refund what it is necessary to pay over and above their wages to the others who must be taken in their place. See "Vubuy Art. 18. Charles V. Article 23 and following", which stipulate and order certain penalties in proportion to the gravity of the offenses and faults committed by the seamen.

2. If the seaman while doing his duty and serving his Master and the vessel, is wounded and injured, he must be treated, given medicine and attended, and be indemnified for everything at the cost of the vessel—See Vubuy Article 18. Hanze-Theuton, Art. 39, Charles V, Art. 27 and 28, Philippe II. King of Spain Art. 16, and if the seaman while serving, is taken by pirates, the Master is under the obligation to ransom him and furthermore to pay his wages just as if he had continued serving during his captivity.—Consulat Chapter 182.

3. And if while defending himself or while fighting against the enemy or against pirates he is multillated or

crippled and unable to work for the rest of his life, in addition to the treatment he shall be given bread* as long as he lives at the expense of the vessel and of the cargo

DECISIONS.

(Page 26.

and this is considered as general average. Hanze-Theut. Art. 35, Charles V Art. 27 and 28. Arg. legis secundum Julianum and ibi Barth and 1. cum duobus Par. quidam, D. Pro socio. Solent enim aestimari naves and quae in navi sunt, atque ex his summa confici ut damna quae eveniunt, in quibus sunt and vulneratorum impendia, ferantur a Dominis navium and mercium pro parte quam habent in ea summa; and haec ipsi juri naturae sunt consentanea Hugo Grotius. De Iure Pacis et Belli lib 2. cap 12, num. 21. Jugement d'Oleron quatrieme. (Fourth Decision of Oleron).

4. In the year 1621, Gilles Esteben, a "Burgher" and Merchant of Bordeaux loaded a vessel of 36 tons with wine for Calais and appointed for the carrying of same his servant by the name of Fiton. The vessel having left the Bordeaux River at high tide, was met by a Pirate Turkish Vessel which ran her down, compelling her to come alongside and finally, having taken them (the crew) prisoner, the pirates left the boat and the wine because, according

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* We quote from page 207 of the Twentieth Century Dictionary:

Bread—1. An article of food made by moistening, kneading, and raising or fermenting the flour or meal of some species of grain, and baking it in an oven, usually in the form of loaves, or as biscuits, rolls, etc.

2. Food in general; as give us this day our daily bread.

3. Support of life in general; maintenance.

to their religion, the Turks do not drink any wine at all and do not deal in same as this is prohibited to them by the Koran. The pirates were possibly in agreement with the Master of the Vessel, who was a Scotchman, because the Turks did not offend him nor his crew but they only took hold of Fiton and took him as a captive in Barbary where he was sold and remained a slave for 4½ years, in great misery and poverty. Finally Fiton was ransomed with arms in the year 1625 and his ransom or redemption was paid in the sum of 780 Livres (French Pounds).

When he returned to Bordeaux, Fiton found that his Master, Gilles Esteben, had died. He started an action against his Widow before the Judges and Consuls of the Exchange and sued for his wages both for the time previous to his captivity and for the time of his detention and slavery and in addition for the reimbursement of his ransom and for damages and interest.

The Widow Esteben refused to pay and requested that the matter be sent back to the Presiding Justice of the Province of Guyenne. The Judges and Consuls rejected her appeal. She appealed to the Superior Court in connection with the main action.

The Court, after having heard Corbies for the Appellant and Du Mantet for Fiton, the Appellee, set aside the appeal, and invoking and upholding the main action and meting justice to the parties condemned, and condemns the party represented by Corbies to pay to the party represented by Du Mantet, all his wages, ransom, expenses, damages and interest in the sum of 1000.—French Pounds without any other expenses, on the last day of April 1630. Mr. Daffis acted as President Justice.

This is in accordance with the Decrees of the Parliament of Paris cited by Mornac. ad legem. inter causas Paragraph. non omnia. D. mandati and against * * *

Certificate of Accuracy

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

TRANSLATION
FROM
French

On this day personally appeared before me A. J. Miroy who, after being duly sworn, deposes and states:

That he is a translator of the French and English languages by profession and as such connected with the LAWYERS' & MERCHANTS' TRANSLATION BUREAU;

That he is thoroughly conversant with these languages;

That he has carefully made the attached translation from the original document written in the French language, (on the official paper of the LAWYERS' & MERCHANTS' TRANSLATION BUREAU); and

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

A. J. MIROY.

Subscribed and sworn to before me this
7th day of January, 1949.

CARL V. BERTSCHE,
(Notarial Stamp).

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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM FARRELL, PETITIONER

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	2
Argument	4
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Calmar S. S. Corp. v. *Taylor*, 303 U. S. 525	4, 5, 6, 7, 8
Edwin, The, 23 Fed. 255	10
Enochasson v. *Freeport Sulphur Co.*, 7 F. 2d 674	11
Falls of Keltie, The, 114 Fed. 357	12
Hust v. *Moore-McCormack Lines*, 328 U. S. 707	8
Ipswich, The, 46 F. 2d 136	12
Jones v. *Waterman S. S. Corporation*, 155 F. 2d 992	11
Larimer, The, 174 Fed. 429	13
McCarron v. *Dominion Atlantic Ry. Co.*, 134 Fed. 762	11
Pell v. *American-West African Line, Inc.*, 1939 A. M. C. 346	12
Schermacher v. *Yates*, 57 Fed. 668	13
Shields v. *United States*, 73 F. Supp. 862	12
Thomas Tracy, The, 24 F. 2d 372	12
Statutes:	
Act of June 26, 1884, 23 Stat. 58, Sec. 19, 46 U. S. C. 572	12
Jones Act, 41 Stat. 1007, 46 U. S. C. 688	2
R. S. 4511 as amended, 46 U. S. C. 564	9, 14
R. S. 4517, 46 U. S. C. 570	12
Miscellaneous:	
46 C. F. R. (1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477	9, 10, 14, 15

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. 280–289) is reported at 167 F. 2d 781.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1948 (R. 290). A petition for rehearing was denied on June 11, 1948 (R. 296). The petition for a writ of certiorari was filed September 9, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the courts below erred in declining to award to a seaman who has sustained permanent injuries a lump sum as future maintenance and cure.

2. Whether a seaman who joins a crew already under shipping articles for a foreign voyage "and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" may recover wages until the expiration of twelve months from the date he joined the ship rather than to the end of the voyage.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of R. S. 4511 as amended, 46 U. S. C. 564, and the Secretary of the Navy's order of March 6, 1942, waiving compliance therewith, 46 C. F. R. (1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477, are set forth in the Appendix, *infra*, pp. 14–15.

STATEMENT

Petitioner, a Government-employed merchant seaman, brought suit in admiralty against the United States and others to recover damages under the Jones Act (41 Stat. 1007, 46 U. S. C. 688), and maintenance, cure and wages under the federal maritime law (R. 2, 5–17). Petitioner's suit was based upon injuries received at Palermo, Sicily, on February 5, 1944, when he fell into a drydock in the course of returning to his ship,

the S. S. *James E. Haviland,* from authorized shore leave. As a result of this accident, petitioner became permanently blind, suffers headaches, and is subject to occasional epileptic seizures (R. 266, 289). There is no need herein to set forth in detail the circumstances surrounding petitioner's accident since both courts below have held, upon a careful review of all the evidence, that it was occasioned by petitioner's own conduct and was not attributable to any negligence on the part of his ship or those in charge of her (R. 263–266, 285). Both courts below accordingly denied petitioner's claim for damages under the Jones Act and petitioner does not here challenge their ruling (Pet. 2). He does, however, challenge their rulings as to his claims for maintenance, cure and wages.

Petitioner was hospitalized in various Government hospitals from the date of his injury until June 30, 1944, at which time he was discharged at Norfolk, Virginia, as completely disabled (R. 266, 287–288). As to petitioner's condition, both courts below found that he had received the maximum cure that medical and surgical aid could accomplish (R. 266, 286–289). The specific issue herein as to future maintenance and cure stems from petitioner's claim for a lump sum award in the amount of $50,000 (R. 14, 15). Petitioner did not adduce, in support of his claim, any evidence as to the anticipated need for medical treatment or its cost or the cost of maintenance while

undergoing such treatment. The district court denied this claim, but awarded petitioner maintenance for six months after his discharge from the hospital at Norfolk as a reasonable allowance of maintenance, as well as an amount to cover petitioner's expenses incurred up to the time of trial for medicine and private medical care (R. 254–255, 266–267). This award was affirmed by the court below (R. 288, 289).

Petitioner's suit also embraced a claim for wages from March 28, 1944, when his ship completed her voyage, until December 16, 1944, the end of the 12-month period from the date on which he joined the ship (Pet. 16–21). Petitioner was not one of those who joined the *Haviland* at the outset of her voyage but signed on from the War Shipping Administration's Replacement Pool at Naples, Italy, on December 16, 1943 (R. 257). Both courts below limited petitioner's recovery of wages to the duration of the voyage (R. 259, 267, 285).

ARGUMENT

1. As his first point petitioner contends that he was injured in the service of the ship, and that therefore under the decision of this Court in *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, the courts below should have applied a "more liberal" rule of maintenance and cure (Pet. 10–16). Although no statement in the petition indicates what petitioner believes that more liberal rule should

be, it is apparent from the *ad damnum* in the libel and from petitioner's contentions in the courts below that what he seeks is a lump sum award, as maintenance and cure for life (R. 14, 15, 286). Despite the doubts expressed by the court below as to the interpretation of certain expressions in the *Calmar* opinion, we believe that this Court there held without qualification, as the court below clearly understood, that a lump sum award in anticipation of a future need for maintenance and cure was improper.

In *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, the seaman was suffering from an incurable disease which tended to be progressive, although care and treatment at frequent intervals, with periodic medical observation, were of aid in arresting its progress. The trial court held that the seaman was entitled to recover the cost of maintenance and medical treatment so long as such treatment was necessary, and, as his affliction was incurable, it entered a decree for a lump sum award based on his life expectancy. This decree was affirmed by the Third Circuit. On certiorari, the question for decision, as stated in the opinion by Mr. Justice Stone, was "whether the duty of a ship owner to provide maintenance and cure for a seaman falling ill of an incurable disease while in its employ extends to the payment of a lump sum award sufficient to defray the cost of maintenance and cure for the remainder of his life." 303 U. S. at 526.

E. Haviland followed the prescribed form, and described the voyage as "from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof * * * and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" (Ex. 3).

Petitioner contends that the right to wages extended for twelve months from the date he joined the vessel, since he was under "a legal obligation to serve for twelve months, if required by the respondents" (Pet. 19). The language of the articles, however, shows plainly that petitioner's only obligation was to serve until the ship returned "to a final port of discharge in the United States," which should not exceed twelve months. Thus, the duration of the crew's legal obligation to serve was not fixed absolutely at twelve months, for the obligation was terminated when the voyage ended by the return of the ship "to a final port of discharge in the United States." Certainly none of the crew would have violated his contract by quitting the ship after the termination of its voyage at New York on March 28, 1944. *The Edwin*, 23 Fed. 255 (S. D. N. Y.).

There is no contractual basis, therefore, for a contention that the ship's obligation to pay wages

continued after that time. As a practical matter, petitioner fails to recognize the distinction between articles for a foreign voyage and those used in the coastwise trades. Since coastwise voyages are comparatively short, the articles are written to cover one or more voyages, for a term not to exceed a specified number of months, commonly with the right in either party to terminate on notice at the end of any voyage. Where a seaman employed under such articles is injured, the ship owner is not permitted to take an unconscionable advantage of him by terminating his employment at the end of the next voyage, but the employment is considered as continuing for the entire term of the articles. *Jones v. Waterman S. S. Corporation,* 155 F. 2d 992, 996 (C. C. A. 3); *Enochasson* v. *Freeport Sulphur Co.,* 7 F. 2d 674 (S. D. Tex.); *McCarron* v. *Dominion Atlantic Ry. Co.,* 134 Fed. 762 (D. Mass.). On the other hand, foreign articles cover only a single voyage to be terminated at a final port of discharge, the maximum time limit for the voyage being inserted for the protection of the seamen.[2] Under foreign articles, the term of employment is therefore the single voyage, ending at the final port of discharge, and not the period of time provided as

[2] Petitioner argues that the word "voyage" is not used in the articles, and that the court below erred in deciding this case as though that word had been used (Pet. 17). However, the language being construed by the Court of Appeals was that inserted in the portion of the shipping articles as to which Note 1 of the articles provided (Ex. 3): "Here the

This Court there held that, although the duty of maintenance and cure was not limited by the duration of the voyage, the award of a lump sum in anticipation of the expense of future maintenance and cure for an indefinite period was improper, and that recovery must be measured by the reasonable cost of that maintenance and cure to which the claimant is entitled at the time of trial, including, where appropriate, amounts needful for maintenance and cure of a kind and for a period in the immediate future which can be definitely ascertained. The Court expressed the view that it could "find no support * * * for holding that [the duty to furnish maintenance and cure] imposes on the ship owner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it," and it could "find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment." The suggestion was made that those cases where the incapacity was caused by the employment might be thought to require a more liberal application of the rule. 303 U. S. at 530.

Upon this *dictum*, petitioner bases his claim to maintenance and cure for life. Petitioner contends that the Court's suggestion of "a more

liberal application of the rule" refers to the rule that a lump sum award to anticipate future maintenance and cure is improper, rather than to the discussion of the circumstances in which a seaman might be entitled to maintenance and cure beyond the termination of the voyage (Pet. 12–13).

Without analyzing the reasoning by which petitioner reaches this conclusion, it is sufficient to observe that petitioner's interpretation is inconsistent with the rationale of the *Calmar* decision. In that case, the lump sum award to cover the cost of maintenance and cure for life was reversed by this Court on three grounds: because (1) the amount and character of the future medical care required cannot be measured by mortality tables; (2) in the marine hospital service the seaman may be treated without expense or in some cases at minimum expense; and (3) the necessity of safeguarding the seaman in case of illness against the consequences of his own improvidence is not met by the payment of a lump sum to cover expenses for medical care during life. 303 U. S. at 530–531. All three of these reasons require the rejection of petitioner's claim. It is impossible now to calculate the cost of whatever medical treatment petitioner may require in the future and there is no reason to believe that such medical care cannot be had through the marine hospital service. As this Court pointed out, a lump sum payment to defray the cost of future

medical treatment cannot serve as a performance of the duty to safeguard the seaman against the consequences of possible improvidence. The courts below awarded petitioner all sums for maintenance and cure to which he was entitled at the time of the trial. We submit that his claim for a lump sum award for future maintenance and cure is contrary to the decision of this Court in the *Calmar* case.

The hardship on petitioner in this case, which we recognize, flows from the fact that seamen and their representatives "Wisely or unwisely, * * * have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault." *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715. The seamen's composite remedy is his right of action under the Jones Act, his general maritime cause of action for unseaworthiness, and the narrow adjunct of these two major remedies, "the historic relief afforded by the general maritime law for maintenance and cure." *Hust* v. *Moore-McCormack Lines,* 328 U. S. at 715–716. Here, petitioner cannot establish negligence or unseaworthiness. In confining relief to maintenance and cure within the limits of its traditional applicability, the courts below herein have given petitioner all to which he is entitled. The present application is in substance a request that this Court now give petitioner, as maintenance and cure, the equivalent of the general damages which he can-

not here recover because of the absence of fault on the part of the ship and her owners, or that maintenance and cure be expanded to afford the full permanent disability benefits to which seamen might be entitled under a statutory workmen's compensation system.[1] We submit that the solution for the plight represented by petitioner's unique case lies only in enactment of comprehensive workmen's compensation legislation.

2. Petitioner's claim for wages rests upon a clearly erroneous construction of his shipping articles. R. S. 4511 as amended, 46 U. S. C. 564, requires that shipping articles shall describe the nature and, as far as practicable, the duration of the intended voyage, and the port at which it is to terminate. During the war, it was undesirable to disclose the description of voyages on which a ship was preparing to set out and, under the authority of emergency war powers, the Secretary of the Navy waived compliance with this requirement of R. S. 4511 and prescribed the form of voyage description to be used. See Appendix, *infra*, pp. 14–15. The articles of the S. S. *James*

[1] Petitioner's prayer for maintenance and cure in the amount of $50,000 illustrates the nature of the request (R. 14, 15). As we have noted above, *supra*, pp. 3–4, there is no evidence in the record as to his need for future medical treatment, its duration or expense in support of this demand. The only evidence adduced by petitioner was a showing, by mortality tables, of a 40.17-year life expectancy (R. 110). The amount of maintenance and cure demanded appears to result from multiplying this life expectancy by a fixed per diem allowance.

its maximum limit.[3] *The Thomas Tracy*, 24 F. 2d 372, 374 (C. C. A. 2); *The Ipswich*, 46 F. 2d 136, 138 (D. Md.); *Pell v. American-West African Line, Inc.*, 1939 A. M. C. 346 (S. D. N. Y.); *The Falls of Keltie*, 114 Fed. 357, 359 (D. Wash.). This is in keeping with the traditional reluctance of seamen to bind themselves to contracts for stated periods of time, particularly long periods of time, and their preference to be through with a vessel when a long voyage ends.

R. S. 4517, 46 U. S. C. 570, and Section 19 of the Act of June 26, 1884, 23 Stat. 58, 46 U. S. C. 572, cited by petitioner (Pet. 17), do not support his contentions. There is nothing in this record to show that petitioner was not engaged in the presence of the proper official as required by the statutes, or that petitioner's rights have been prejudiced in any way by any failure to comply with their provisions. The meaning of the term "final port of discharge" as used in shipping

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nature of the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate."

It is clear, therefore, that the language referred to was a *voyage description*, even though it did not include the word "voyage."

[3] The case of *Shields v. United States*, 73 F. Supp. 862 (E. D. Pa.), on which petitioner relies, does support his contention that the articles here involved should be construed as entitling him to wages for the full twelve months. An appeal from that decision is now pending in the United States Court of Appeals for the Third Circuit.

articles is well settled. It means that port at which the vessel is completely relieved of her cargo and thus becomes ready for another venture. *The Larimer*, 174 Fed. 429 (E. D. Pa.); *Schermacher* v. *Yates*, 57 Fed. 668 (E. D. N. Y.). This being true, we submit that there was no ambiguity in the articles, and that the court below was clearly correct in holding that petitioner's term of employment ended on March 28, 1944, with the termination of the voyage of the *Haviland* at New York.

CONCLUSION

The judgment of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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NOVEMBER 1948.

APPENDIX

Statute and Regulation Involved

1. R. S. 4511 as amended, 46 U. S. C. 564, provides in pertinent part:

> The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:
>
> First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.
>
> * * * * *

2. The Secretary of the Navy's order of March 1942, waiving compliance with certain of the provisions of R. S. 4511 as amended, 46 C. F. R. 1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477, provides:

DESCRIPTION OF VOYAGE IN SHIPPING ARTICLES

By virtue of the authority vested in me by the provisions of Executive Order No. 8976, dated December 12, 1941 and Executive Order No. 9083, dated February 28, 1942 (3 CFR Cum. Supp.), I hereby waive compliance with the provisions of section 4511 R. S. as amended (46 U. S. C. 564), and section 2 of the act of June 19, 1886, as amended (46 U. S. C. 563), to the extent hereinafter set forth:

(1) So much of section 4511 R. S. as amended, and section 2 of the act of June 19, 1886, as amended, as requires shipping articles to contain, in writing or in print, particulars as to the nature of the intended voyage or engagement is waived: *Provided*, That,

(a) The description of voyages on articles of agreement signed covering the departure of vessels of all categories from United States ports shall read:

To a point in the * Ocean to the ** of *** and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or agency, thereof, and back to a final port of discharge **** in the United States **** for a term of time not exceeding ——— calendar months.

*Name of ocean.

**Westward, eastward, southward, or northward.

***Name of port (New York, San Francisco, etc.).

****Here may be inserted, if desired, such stipulations as: "And/or first loading port and/or bunkering port, and the locality where the voyage is to terminate".

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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM FARRELL, PETITIONER

v.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION, LUCKENBACH STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute, regulation, and convention involved	3
Statement	3
Summary of argument	6
Argument	10
I. A permanently disabled seaman is not entitled to further maintenance and cure after a maximum cure has been attained	12
II. A lump sum award as future maintenance and cure for life is improper in any event	27
III. Petitioner is not entitled to wages beyond the end of the voyage	31
Conclusion	36
Appendix	37

CITATIONS

Cases:

Aguilar v. *Standard Oil Co.*, 318 U. S. 724	6, 16, 17
Balsa, Schooner, 1924 A. M. C. 1333	14
Bouker No. 2, The, 241 Fed. 831, certiorari denied *sub nom. Jones* v. *Bouker Contracting Co.*, 245 U. S. 647	13
Calmar S. S. Corporation v. *Taylor*, 303 U. S. 525	5, 6, 7, 8, 12, 13, 15, 16, 17, 27, 28, 30
Catalonia, The, 236 Fed. 554	35
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372	20
City of Alexandria, The, 17 Fed. 300	14
Crowell v. *Benson*, 285 U. S. 22	25
C. S. Holmes, The, 209 Fed. 970	13
De Zon v. *Amer. President Lines*, 318 U. S. 660	14
Edwin, The, 23 Fed. 255	32
Electric Battery Co. v. *Shimadzu*, 307 U. S. 5	26
Enochasson v. *Freeport Sulphur Co.*, 7 F. 2d 674	34
Falls of Keltie, The, 114 Fed. 357	35
Gardner v. *The New Jersey*, Fed. Cas. No. 5233	32
Gilvary v. *Cuyahoga Valley Ry.*, 292 U. S. 57	20
Hellevik v. *American Sugar Transit Corp.*, 261 App. Div. 591, 26 N. Y. S. 2d 724	35
Hust v. *Moore-McCormack Lines*, 328 U. S. 707	22, 24
Ipswich, The, 46 F. 2d 136	34
Johnson v. *United States*, 333 U. S. 46	30
Jones v. *Waterman S. S. Corporation*, 155 F. 2d 992	34
Joseph v. *Carter & Weekes Co.*, 330 U. S. 422	26
Josephine & Mary, The, 120 F. 2d 459	14

819498—49——1

Cases—Continued

	Page
Kahyis v. *Arundel Corporation*, 3 F. Supp. 492	14
Kenilworth, The, 144 Fed. 376, certiorari denied *sub nom. Krelly* v. *The Kenilworth*, 202 U. S. 617	13
Larimer, The, 174 Fed. 429	35
Lindgren v. *Shepherd S. S. Co.*, 108 F. 2d 806	14
Loverich v. *Warner Co.*, 118 F. 2d 690, certiorari denied, 313 U. S. 577	15
Luksich v. *Misetich*, 140 F. 2d 812, certiorari denied, 322 U. S. 761	14
Lynskey v. *Great Lakes Transit Corporation*, 42 F. Supp. 816	14
Mahnich v. *Southern S. S. Co.*, 45 F. Supp. 839, affirmed, 129 F. 2d 857, reversed on other grounds, 321 U. S. 96	14
Manhattan Properties v. *Irving Trust Co.*, 291 U. S. 320	26
Mars, The, 149 Fed. 729	14
McCarron v. *Dominion Atlantic Ry. Co.*, 134 Fed. 762	34
Mermaid, The, 115 Fed. 13	35
Miluton v. *Princ Pavle*, 1942 A. M. C. 259	14
Missouri v. *Ross*, 299 U. S. 72	26
Montilla v. *United States*, 70 F. Supp. 181	14
Moyle v. *National Petroleum Transport Corporation*, 150 F. 2d 840	30
New York Central R. R. Co. v. *Winfield*, 244 U. S. 147	20
Nogueira v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128	22
Norton v. *Warner Co.*, 321 U. S. 565	22
Nyack, The, 199 Fed. 383	13
O'Donnell v. *Great Lakes Co.*, 318 U. S. 36	25
Oregon-Washington Co., v. *Washington*, 270 U. S. 87	20
Osceola, The, 189 U. S. 158	19
Pell v. *American West-African Line, Inc.*, 1939 A. M. C. 346	34
Pochasset, The, 295 Fed. 6	13
Point Fermin, The, 70 F. 2d 602	13
Raymond v. *The Ella S. Thayer*, 40 Fed. 902	13
Reed v. *Canfield*, Fed. Cas. No. 11,641	14
Rey v. *Colonial Nav. Co.*, 116 F. 2d 580	30
Robinson v. *Swayne & Hoyt*, 33 F. Supp. 93	30
Schermacher v. *Yates*, 57 Fed. 668	35
Shapiro v. *United States*, 335 U. S. 1	26
Sickner v. *Great Lakes Transit Corporation*, 17 F. Supp. 330	13
Skolar v. *Lehigh Valley R. Co.*, 60 F. 2d 893	13
South Chicago Co. v. *Bassett*, 309 U. S. 251	22
Southern Pacific Co. v. *Jensen*, 244 U. S. 205	25
Thomas Tracy, The, 24 F. 2d 372	34
Tol v. *United States*, 166 F. 2d 775	15, 30
United States v. *Hill*, 248 U. S. 420	26
United States v. *Standard Oil Co.*, 332 U. S. 301	19
Warner v. *Goltra*, 293 U. S. 155	22
Waterman Steamship Corp. v. *Jones*, 318 U. S. 724, 738	18
W. H. Hoodless, The, 38 F. Supp. 432, affirmed *sub nom. Armit* v. *Loveland*, 115 F. 2d 308	14
Whitney v. *Olsen*, 108 Fed. 292	14

Statutes: Page

Act of June 26, 1884, 23 Stat. 58, 46 U. S. C. 572 35
Jones Act, Act of June 5, 1920, c. 250, sec. 33, 41 Stat. 1007, 46 U. S. C. 688 ..... 3, 10, 20
Longshoremen's and Harbor Workers' Act, c. 509, 44 Stat. 1424, as amended, 33 U. S. C. 901-950 22
R. S. 4511, as amended, 46 U. S. C. 564 ..... 3, 33, 37
R. S. 4517, 46 U. S. C. 570 35
Seaman's Welfare Act of 1915, Act of March 4, 1915, c. 153, sec. 20, 38 Stat. 1185 19
Shipowners' Liability Convention of 1936, 54 Stat. 1693 18
Article 4, Clause 1 ..... 3, 7, 18, 27
Article 12 ..... 3, 19

Miscellaneous:

46 C. F. R. (1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477 ..... 3, 37-38
Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st sess., on H. R. 6726 and H. R. 6881:
P. 83 ..... 22, 23, 25
P. 131 25
Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881:
P. 17 23
P. 111 24
Pp. 79-80, 154-156, 162-163, 181-187, 187-188, 292-296 ..... 23, 24
P. 297 29
H. Rep. No. 1328, 76th Cong., 1st sess., p. 7 18

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of New York, which appears at pages 10–25 of the printed records is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 36–43) is reported at 167 F. 2d 781.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1948 (R. 43). A petition for rehearing was denied on June 11, 1948 (Tr.

296). The petition for a writ of certiorari was filed on September 9, 1948, and was granted on November 22, 1948 (R. 44). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a seaman who, through his own negligence and not as a result of any negligence on the part of his employer, was permanently and totally disabled by injuries sustained while he was on his employer's premises in the process of returning to his ship from shore leave, is entitled to continue receiving maintenance and cure indefinitely, where it is established that the seaman has already received the maximum cure that medical and surgical aid may accomplish.

2. Assuming that a permanently and totally disabled seaman is entitled to maintenance and cure beyond the time when the maximum cure possible has been attained, whether a lump sum award as future maintenance and cure is proper.

3. Whether a seaman who joins a crew already under shipping articles for a foreign voyage "and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" may recover wages until the expiration of twelve months from the date he joined the ship rather than to the end of the voyage.

STATUTE, REGULATION, AND CONVENTION INVOLVED

The pertinent provisions of R. S. 4511 as amended, 46 U. S. C. 564, and the Secretary of the Navy's order of March 6, 1942, waiving compliance therewith, 46 C. F. R. (1943 Supp.), Appendix A, p. 2080, 7 F. R. 2477, are set forth in the Appendix, *infra*, pp. 37–39. Article 4, Clause 1, and Article 12, of the Shipowners Liability Convention of 1936, 54 Stat. 1696, 1700, are set forth in the Argument, *infra*, at pp. 18–19.

STATEMENT

Petitioner, a Government-employed merchant seaman, brought suit in admiralty against the United States and others to recover damages under the Jones Act (41 Stat. 1007, 46 U. S. C. 688), and maintenance, cure and wages under the federal maritime law (R. 1–7). Petitioner's suit was based upon injuries received at Palermo, Sicily, on February 5, 1944, when he fell into a drydock in the course of returning to his ship, the S. S. *James E. Haviland*, from authorized shore leave (R. 28–29). As a result of this accident, petitioner became permanently blind, suffers headaches, and is subject to occasional epileptic seizures (R. 33, 43). Petitioner was hospitalized in various Government hospitals from the date of his injury until June 30, 1944, at which time he was discharged at Norfolk, Virginia, as completely disabled (R. 32, 42). Both courts below found that he has received the maximum cure that medical treatment and surgical aid could

accomplish, but that from time to time he will require some medical care to relieve his attacks of headaches and epileptic convulsions (R. 33, 43).

There is no need herein to set forth in detail the circumstances surrounding petitioner's accident, since both courts below have held, upon a careful review of all the evidence, that it was occasioned by petitioner's own conduct and was not attributable to any negligence on the part of his ship or those in charge of her (R. 31–32, 38–40). Both courts below accordingly denied petitioner's claim for damages under the Jones Act, and petitioner does not here challenge their ruling (Pet. 2). He does, however, challenge their rulings as to his claims for maintenance and cure, and for wages.

Petitioner sought maintenance and cure in the amount of $50,000 (R. 6–7). Although this claim was purportedly based on past expenditures and anticipated future expenditures for medical treatment (Paragraph 36 of Libel, R. 6), petitioner did not adduce in support of his claim any evidence as to the anticipated need for medical treatment or its cost, or the cost of maintenance while undergoing such treatment.[1] On the basis of its finding that maximum cure had been accomplished, the district court awarded petitioner

[1] As we pointed out in our brief in opposition (p. 9), the only evidence adduced by petitioner was a showing, by mortality tables, of a 40.17-year life expectancy. The amount of maintenance and cure demanded appears to result from multiplying this life expectancy by a fixed per diem allowance (of $3.50), with the result stated in round figures.

maintenance for six months after his discharge from the hospital at Norfolk (on June 30, 1944) as the reasonable period for maintenance during which maximum cure would be attained,[2] and also an amount to cover his expenses up to the time of the trial (June 10, 1947 (R. 24)) for medicine and private medical care (R. 33–34). This award was affirmed by the court below (R. 42–43). Both courts below held that the duty of the ship owner to provide maintenance and cure does not extend beyond the time when the maximum cure possible has been effected, with the district court holding in addition that in any case a lump sum award for future maintenance and cure was prohibited by this court's decision in *Calmar S. S. Corporation v. Taylor,* 303 U. S. 525 (R. 24, 33, 41, 43).

Petitioner's suit also embraced a claim for wages from March 28, 1944, when his ship completed her voyage at New York, until December 16, 1944, the end of the 12-month period from the date on which he joined the ship (Pet. 16–21). Petitioner was not one of those who joined the Haviland at the outset of her voyage, but he signed on from the War Shipping Administration's Replacement Pool at Naples, Italy, on December 16, 1943 (R. 26, 27). Both courts below limited petitioner's recovery of wages to the duration of the voyage (R. 33, 40).

[2] The district court's allowance for maintenance and cure was at the rate of $3.50 per day (R. 24).

SUMMARY OF ARGUMENT

I

Both courts below having found that the accident which resulted in petitioner's permanent disability was caused solely by his own negligence, his right to recover is limited to maintenance and cure, along with wages to the end of the voyage. As to maintenance and cure, both courts below held that petitioner's right did not extend beyond the time when the maximum cure possible had been attained, and having found that he has received the maximum cure that medical treatment and surgical aid may accomplish, made an award accordingly. The rule thus applied by the courts below is fully supported by judicial precedent. Petitioner contends, however, that he is entitled to recover in this proceeding a lump sum award as maintenance and cure for life because of his permanent disability, relying upon a dictum in *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, that "a more liberal application of the rule" might be called for in "those cases where the incapacity is caused by the employment." This dictum, if it embodied a rule, would be inconsistent with the holding of this court in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, that the availability of maintenance and cure should not depend upon distinctions in a seaman's activity at the time he becomes ill or is injured. However, the dictum was not the enunciation of a rule but merely the reserva-

tion of the question in the event that a later case should present considerations not present in the *Calmar* case. Petitioner does not advance any considerations to justify the establishment of a double standard of maintenance and cure, favoring those whose incapacity is "caused" by their "employment." Indeed, there are no considerations which justify the unequal application of the doctrine of maintenance and cure.

The doctrine that an injured seaman's right to maintenance and cure does not extend beyond the time when he is cured as far as possible, well established by judicial precedent, received formal expression in Article 4, Clause 1, of the Shipowner's Liability Convention of 1936, which, although it added nothing to the rule, nevertheless embraced the full limits of the doctrine. Whatever may be the power of this Court to vary the provisions of this Convention by broadening the rule, we believe that by its activity in the field of seamen's rights Congress has pre-empted the field, and has indicated clearly its approval of the existing scheme of remedies. The seamen's rights of maintenance and cure and the general maritime cause of action for unseaworthiness—the remedies developed by judicial decision—were supplemented by the enactment of the Jones Act, so that the final step in the formulation of the composite remedy now available to seamen was brought about by Congressional action. Despite repeated efforts to substitute for this

composite remedy a comprehensive statutory workmen's compensation system, Congress has left the present remedies undisturbed, at the insistence of seamen's representatives. In doing so, Congress was unquestionably aware of the rule that an injured seaman's right to maintenance and cure ends when a maximum cure had been obtained. In view of the paramount power of Congress to determine the remedies to be afforded seamen injured while engaged in maritime service, the failure of Congress to make any change in existing remedies can only be taken as an implied approval and adoption of the doctrine consistently stated in the prior court decisions. Thus, the extension by judicial action of the doctrine of maintenance and cure as it is now stated in Article 4 of the Shipowner's Liability Convention would, we submit, run counter to the position which Congress has taken in this same field.

II.

Whatever the duration of the right of a permanently injured seaman to maintenance and cure, this Court held without qualification in the *Calmar* case that a lump sum award of anticipated future maintenance and cure for life was improper. In refusing petitioner such a lump sum award the district court relied specifically upon the *Calmar* decision. Moreover, there is no evidence here as to the cost of anticipated neces-

sary medical treatment or of maintenance while such treatment is being received. Absent such evidence, there is no basis for an award of future maintenance and cure. This is dispositive of petitioner's claim to anything beyond what he has already been awarded in this action, without regard to the duration of his right to maintenance and cure. If petitioner can establish in a later proceeding that he has received further treatment of a curative nature, then on that record he may be able to recover the expenses of such treatment, together with maintenance.

III

Petitioner claims that under the terms of his shipping articles he was entitled to wages for twelve months after the date he joined the ship, even though the voyage was completed earlier. Petitioner's shipping articles, in compliance with controlling wartime regulations, were in the same form as the articles of every other ship departing from ports of the United States during that period. These articles did not impose on petitioner an absolute legal obligation to serve for twelve months, but only until the ship returned "to a final port of discharge in the United States." Where a seaman is injured while under articles such as are commonly used in the coastwise trades, providing for one or more short voyages to be made within a specified number of months, the stated period of time is taken as the

duration of his right to wages. This is not such a case. Here the form of the articles was such as is used for foreign voyages, and clearly contemplated only one voyage, to which the seaman's right to wages is limited. In view of the fact that every seaman shipping from a United States port during the war was under similar articles, and that seamen are traditionally reluctant, when shipping in foreign trade involving long voyages, to bind themselves to contracts for stated periods of time rather than for a specified voyage, the construction of the articles urged by petitioner is obviously erroneous.

ARGUMENT

The petition[2] in this case presents contentions with regard to two aspects of the composite remedy available to seamen in cases of personal injury, namely, the right (a) to maintenance and cure, and (b) to wages. Petitioner is a seaman who is permanently disabled as the result of an accident caused solely by his own negligence. Accordingly, he is without the right to recover damages under the Jones Act (46 U. S. C. 688), or on account of unseaworthiness. Both courts below so held and petitioner does not here challenge their rulings (Pet. 2). Moreover, petitioner has been awarded the amount of maintenance and cure, and of wages, to which he is

[2] We refer to the petition for certiorari inasmuch as no brief on the merits has been filed herein by petitioner.

entitled in this case in accordance with established law.

Petitioner's present claim of a further sum on account of maintenance and cure is a demand for a lump sum award equivalent to maintenance and cure for life (R. 6, 41). The large sum demanded ($50,000 in the libel) appears to encompass, in greatest part, a claim for a per diem allowance for the rest of petitioner's life (fns. 1 and 2, *supra*, pp. 4–5), and only in minor degree does it cover possible future medical expenses to relieve his symptoms. As we have pointed out (*supra*, p. 4), petitioner did not present in support of his claim any evidence as to the anticipated need for medical treatment or its cost, or the cost of maintenance while undergoing such treatment; and the courts below have found, as to future treatment, only that "some medical care" will be required "from time to time" to alleviate petitioner's attacks of headaches and epileptic convulsions (R. 33, 43). *Supra*, pp. 3–4. The demand for a lifetime award based on a per diem calculation apparently derives from petitioner's theory that he is entitled to recover intermittent palliative medical expenses, and that the recovery of such expenses from time to time carries with it a right to an uninterrupted maintenance allowance as a lifetime out-patient.

In our view, neither portion of the claim is recoverable, despite the appeal which the hard-

ship of petitioner's plight lends to his contentions. Well established case and statutory law, and clear Congressional understanding in the field of seaman's remedies, permit recovery of maintenance and cure only until the sick or injured seaman has been cured, if cure is possible, or until the sickness or incapacity has become chronic or permanent. In disregarding these rules, petitioner is seeking from this Court relief not available to him under the system of remedies presently provided for seamen, and which can only be created, we submit, by Congressional action.

Petitioner's claim for a lump sum award can also, and in our view might well be, disposed of on the narrower grounds that the present record contains no basis on which an award looking to the indefinite future can be justified or grounded, and that, whatever the scope or duration of the shipowner's liability, lump sum awards covering lengthy periods of future maintenance and cure are not countenanced.

I

A PERMANENTLY DISABLED SEAMAN IS NOT ENTITLED TO FURTHER MAINTENANCE AND CURE AFTER A MAXIMUM CURE HAS BEEN ATTAINED

1. In *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, this Court, after examining the authorities dealing with t shipowner's obligation to provide maintenance and cure in the case of a chronic illness, concluded that it could "find no basis for

saying that * * * the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment." 303 U. S. at 530.[4] This was but the enunciation of a well established principle, as federal admiralty courts had always recognized that in some cases of illness or injury a positive cure is impossible, and had uniformly held in such cases that the shipowner's liability ended when the seaman was cured as far as possible. *The Point Fermin,* 70 F. 2d 602, 604 (C. A. 5); *The Pochasset,* 295 Fed. 6, 9–10 (C. A. 1); *The Kenilworth,* 144 Fed. 376, 378–379 (C. A. 3), certiorari denied *sub nom. Krelly* v. *The Kenilworth,* 202 U. S. 617; *Sickner* v. *Great Lakes Transit Corporation,* 17 F. Supp. 330, 331 (W. D. N. Y.); *The C. S. Holmes,* 209 Fed. 970, 975 (W. D. Wash.); *Raymond* v. *The Ella S. Thayer,* 40 Fed. 902, 904 (N. D. Cal.). See *Skolar* v. *Lehigh Valley R. Co.* 60 F. 2d 893, 895 (C. A. 2); *The Bouker No. 2,* 241 Fed. 831, 835 (C. A. 2), certiorari denied *sub nom. Jones* v. *Bouker Contracting Co.,* 245 U. S. 647; *The Nyack,* 199 Fed. 383,

[4] The Court of Appeals is plainly right in stating that the *Calmar* opinion's reservation to the claimant of the right to bring a later suit to recover further maintenance and cure "to which he may then be entitled" (303 U. S. at 531–2) rests on the fact that the seaman in that case "was not at the time of the trial as cured as he could ever possibly be" (R. 42–3).

819498—49—3

391 (C. A. 7); *The Mars,* 149 Fed. 729, 731 (C. A. 3); *Whitney* v. *Olsen,* 108 Fed. 292, 297 (C. A. 9); *Kahyis* v. *Arundel Corporation,* 3 F. Supp. 492, 495 (D. Md.); *The City of Alexandria,* 17 Fed. 390, 393–394 (S. D. N. Y.); *Reed* v. *Canfield,* Fed. Cas. No. 11,641, p. 429 (C. C. D. Mass.); *Schooner Balsa,* 1924 A. M. C. 1333 (E. D. Pa.). As this Court later expressed it in *De Zon* v. *Amer. President Lines,* 318 U. S. 660, 667, fn. 3, "The duty is not to 'cure' in the literal sense, but to provide care, including nursing and medical attention." Since the *Calmar* decision, the lower federal courts have reaffirmed as settled doctrine the rule that a seaman who contracts an incurable disease or is permanently disabled by injury in the course of his employment is not entitled to maintenance and cure beyond the time that a maximum cure is attained. *Luksich* v. *Misetich,* 140 F. 2d 812, 814 (C. A. 9), certiorari denied, 322 U. S. 761; *The Josephine & Mary,* 120 F. 2d 459, 464 (C. A. 1); *Lindgren* v. *Shepherd S. S. Co.,* 108 F. 2d 806, 808 (C. A. 2); *Mahnich* v. *Southern S. S. Co.,* 45 F. Supp. 839, 841 (E. D. Pa.), affirmed, 129 F. 2d 857 (C. A. 3), reversed on other grounds, 321 U. S. 96; *The W. H. Hoodless,* 38 F. Supp. 432, 434 (E. D. Pa.), affirmed *sub nom. Armit* v. *Loveland,* 115 F. 2d 308 (C. A. 3); *Miluton* v. *Princ Pavle,* 1942 A. M. C. 259, 261 (D. Md.); see *Montillo* v. *United States,* 70 F. Supp. 181, 185 (E. D. N. Y.); *Lynskey* v. *Great Lakes Transit Corpora-*

tion, 42 F. Supp. 816, 817 (W. D. N. Y.); cf. *Loverich* v. *Warner Co.*, 118 F. 2d 690 (C. A. 3), certiorari denied, 313 U. S. 577.

This rule was applied in the case at bar by the courts below, both of which found that petitioner has received the maximum cure that medical treatment and surgical aid may accomplish (R. 33, 41, 43).[5] In apparent recognition of the force and present applicability of the rule, petitioner seeks to base his claim to maintenance and cure for life upon a remark in the *Calmar* opinion (303 U. S. at 530) that "a more liberal application of the rule" *might* be called for in "those cases where the incapacity is caused by the employment" (Pet. 12–14).[6] We have found nothing in any other decision by this Court or any other federal court (including the lower court cases cited in *Calmar*)

[5] In view of this concurrent finding, it is clear that the courts below considered the medical care necessary to alleviate petitioner's attacks of headaches and possible epileptic convulsions to be merely palliative and not curative treatment. We do not contend that the judgment in this case forecloses petitioner's right to a further recovery should some future advance in medical or surgical art make possible a more complete cure. *Tol* v. *United States*, 166 F. 2d 775, 778 (C. A. 9); see *infra*, pp. 29–30.

[6] Contrary to petitioner's suggestion (Pet. 16), the court below expressly reserved decision on the question whether petitioner's injury was caused by his employment, stating merely that as he was "on shore leave, in the process of returning to his ship, and on the employer's premises, the point seems arguable, it not being clear that the injuries were received as a result of intoxication or some other willful misbehavior" (R. 41).

which even intimates that there is or should be such a double standard in the doctrine of maintenance and cure. On the contrary, this Court has specifically rejected the notion that the availability of relief by way of maintenance and cure should depend upon distinctions in a seaman's activity at the time he becomes ill or is injured. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 735–737. Since the shipowner's liability for maintenance and cure arises regardless of his fault, there is no reason for establishing varying degrees of liability under the doctrine. The needs of permanently disabled seamen are the same without regard to the circumstances in which the disability was incurred. And tenuous differences in such circumstances give rise to no considerations of logic or fairness which justify the establishment of a rule of uneven access to maintenance and cure. Cf. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 735, fn. 23.

In fact, the *Calmar* dictum did not contemplate the automatic application of a more liberal rule in cases where the incapacity was caused by the employment. The suggestion of the Court that, in such cases "* * * considerations not present here may apply * * *" (303 U. S. at 350), indicates that the Court announced no rule, contrary to petitioner's contention, but was merely leaving the question open so as to be unembarrassed in prescribing a more liberal rule in the event special considerations could be shown to

justify it. Petitioner's reliance on the dictum is not supported by considerations which would justify special treatment in his case. Weighing his claim in the light of the reasons underlying the shipowner's duty to provide maintenance and cure, there is no consideration present here which is not also present in every other case where, without wilful misconduct, a seaman under articles falls sick or is injured.[7] Thus, even assuming *arguendo* that petitioner's incapacity was "caused" by his "employment", the significance of that fact in relation to the reasons underlying the doctrine of maintenance and cure is not shown. We submit that, as the Court of Appeals held (R. 41–2), there is no such significant relation, and that petitioner's claim to maintenance and cure for life finds no support either in historic policy or judicial precedent.

2. The rule that a shipowner is under the duty to provide maintenance and cure only until a

[7] "* * * The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in *Harden* v. *Gordon*, Fed. Case No. 6047 (C. C.): the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 528. See *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 735.

maximum cure has been effected does not rest upon judicial precedent alone. The Shipowners' Liability Convention of 1936, 54 Stat. 1693, which became effective on October 29, 1939, provides as follows in Article 4, Clause 1 (54 Stat. 1696):

> The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, *or until the sickness or incapacity has been declared of a permanent character.* [Italics supplied.]

This description of the shipowner's liability, though couched in different terms, is substantially the same as that contained in the cases cited above (*supra*, pp. 12–15), for a sickness or incapacity must necessarily be declared of a permanent character when, though not completely cured, it has been cured as far as possible.[8] Thus, this treaty provision added nothing to the doctrine of maintenance and cure as it already had been developed by case law in this country, but it did embrace the full limits of that doctrine.

Absent other considerations, this Court might find in itself, by a broad construction of Article

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[8] Article 4, Clause 1, of the Shipowners' Liability Convention of 1936 is self-executing and does not require implementing legislation. See letter of Secretary of State to the President, dated June 12, 1939, quoted in H. Rep. No. 1328, 76th Cong., 1st sess., p. 7. Cf. concurring opinion of Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones*, 318 U. S. 738.

12 of the Convention,[9] a power to vary the provisions of Article 4 comparable to the function of development which it exercises with regard to past judicial precedent. In our view, controlling considerations which limit the exercise of such power are here present. These considerations derive from the history and nature of Congressional activity in the familiar legislative field of seamen's rights, which point to Congress as the only proper innovator in this area. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 315–316.

3. The right to maintenance and cure, and the right of action against the vessel and her owner for indemnity for injuries caused by unseaworthiness, comprise the seaman's historic relief springing from the general maritime law. *The Osceola*, 189 U. S. 158. In Section 20 of the Seaman's Welfare Act of 1915 (Act of March 4, 1915, c. 153, sec. 20, 38 Stat. 1164, 1185), Congress made its first effort to modify the maritime law to provide additional relief, by providing that in an action for injuries sustained on board a vessel or in its service seamen having command should not be considered fellow servants of their subordinates.

[9] Article 12 of the Shipowners' Liability Convention of 1936 provides (54 Stat. 1700):

"Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention."

The effort accomplished nothing, however, as this Court held that the maritime law already imposed liability upon the shipowner for wages, maintenance, and cure where a crew member was injured at sea by reason of another's negligence, regardless of their relationship, and that Section 20 did not extend the measure of that maritime liability to the full scope of the liability imposed by the common law upon an employer on shore. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. Congress thereafter passed the Jones Act (Act of June 5, 1920, c. 250, sec. 33, 41 Stat. 1007, 46 U. S. C. 688) giving seamen a right of action against the shipowner for injuries resulting from negligence, and abolishing the traditional defenses based on the fellow servant rule and assumption of risk. In so doing, Congress must be considered as having asserted its paramount right to determine the remedies of maritime workers. Cf. *Gilvary* v. *Cuyahoga Valley Ry.*, 292 U. S. 57, 60–61; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, 101–103; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 151–152, 153.

The protection afforded by the composite remedy consisting of the general maritime law and the Jones Act, while broad, is not complete. If a seaman is injured through the negligence of the owner or the unseaworthiness of the ship, he is fully protected, in theory at least, by his right of action, regardless of whether the dis-

ability resulting from the injury is permanent or merely temporary; and he has, in addition, the right to maintenance and cure. On the other hand, if the seaman's injury is not a result of negligence or unseaworthiness, his right to maintenance and cure is the only relief available to him. But maintenance and cure affords adequate protection only in the case of minor injuries causing merely a temporary disability. It is entirely inadequate if the disability is permanent, because, as we have pointed out (*supra*, pp. 12–15), the accepted doctrine is that "cure" does not mean a positive cure, which may be impossible, but only care until the maximum possible cure has been effected. Thus where, as here, a seaman is permanently disabled through his own negligence, the shipowner's liability for maintenance and cure does not continue as long as the disability exists, but ends when the maximum cure has been attained.

In the case of industrial employees on shore, the hardship on the individual and the burden on society in such cases have been relieved by workmen's compensation statutes which impose on the employer, as one of the incidents of doing business and as a direct charge on the industrial operation, the cost of providing medical care and weekly compensation to the employee injured in the course of his employment, and in the event of death as the result of such injuries, compensa-

tion to his dependents. Under workmen's compensation, the employer, because of the imposition of liability without fault in all cases, is relieved of the hazard of large verdicts in cases where he has been negligent. The employee benefits by the certainty of recovery whatever the cause of the injury and by the provision for immediate medical care. These are likewise benefits to society at large, since an injured workman presents the same sociological problem whether his injury resulted from his own or his employer's negligence, or was wholly accidental.

Although Congress provided compensation coverage for some maritime workers by the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424, as amended, 33 U. S. C. 901–950, all efforts to extend such coverage to masters and crew members have been frustrated by the opposition of the representatives of the various seamen's organizations, as this Court has pointed out on numerous occasions. See *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 159–160; *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256–257; *Norton* v. *Warner Co.*, 321 U. S. 565, 570; *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 715. The reason for this opposition was summarized in a brief by Max Lustig, Assistant General Counsel for the National Maritime Union, in these words (Hearings before the House Committee on Mer-

chant Marine and Fisheries, 76th Cong., 1st sess., on H. R. 6726 and H. R. 6881, p. 83):

> The answer is to be found in the United States statute books and general maritime laws affecting seamen who are injured. Upon an analysis we find that the existing maritime laws amply afford all of the protection that a seaman needs when his injuries are minor and not of a totally disabling kind. That protection is guaranteed by the provisions generally known as maintenance and cure. But, in addition to maintenance and cure, the law guarantees to seamen the right to maintain an action against the steamship owner, to recover by trial, before a court and jury, damages for partial or total disability.

Thus, despite the fact that all the other leading maritime nations of the world have applied the principle of workmen's compensation to seamen,[10] and despite the earnest recommendation of impartial observers that this country do likewise,[11] seamen have consistently rejected the more cer-

[10] The nations which have done so include Denmark, France, Germany, Great Britain, Holland, Italy, Norway, and Sweden. See Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881, p. 17.

[11] See *e. g.*, Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881, pp. 79–80, 154–156, 162–163, 181–187, 187–188, 292–296. The case for the application of workmen's compensation to seamen was well stated by James C. Healy, Director of the Seamen's House, Y. M. C. A., New York

tain, if more modest, benefits of a compensation statute for a possibly greater recovery under the Jones Act. "Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault." *Hust v. Moore-McCormack Lines,* 328 U. S. at 715. Whatever may be said as to the wisdom of this choice, the fact remains that it has been the basis of a consistent Congressional policy since the passage of the Jones Act in 1920 to leave undisturbed the existing scheme of remedies available to masters and crew members.[12] And, of course, the general authority of Congress to determine the remedies to be afforded seamen injured while engaged in

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City, in discussing certain statistics, when he said (p. 183): "And I would like to speak a word, not for the 8 men who received damages which extended from about $5,000 to $34,000, in that first bracket of 8, I would like to speak a word to the men that only received about $65, or $130 if you give them the gross, to $2,500—in other words, out of the 34 men, 8 received substantial awards, about 26 received very, very small awards, and in some cases received no awards, or the decision was against them. It is those men that I contact, those are the men that I have the conversations with, the men who have gone up and lost, and I feel that any compensation act which would stabilize it so that that particular group of men would receive more, without litigation, would be for the benefit of the industry and for the benefit of the seamen."

[12] See Hearings before Subcommittee of Senate Committee on Commerce, 76th Cong., 3d sess., on H. R. 6881, p. 111, referring to the opposition of seamen and their representatives to such legislation in 1922, 1927, 1939 and 1940.

maritime service is beyond dispute. *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 42; *Crowell* v. *Benson*, 285 U. S. 22, 39; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215.

During the many hearings which have been held before Congressional committees considering the enactment of comprehensive statutory coverage for the entire maritime industry, the relative merits of existing remedies as compared with proposed systems have been explored exhaustively. During these hearings, it was clearly understood that the shipowner's liability for maintenance and cure ended when a maximum cure had been attained.[19] Moreover, the duration of that liability

[19] *E. g.*, Max Lustig, Assistant General Counsel, National Maritime Union, said in a brief filed with the House Committee on Merchant Marine and Fisheries (Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st sess., on H. R. 6726 and H. R. 6881, p. 83): "Seamen are usually injured while on a voyage, and upon receiving an injury, he becomes entitled to: * * * 3. Maintenance * * * during—(a) the period that a seaman receives treatment at a hospital either as an in-patient or an out-patient; and (b) during a period of convalescence, *and until the maximum cure is obtained.*" [Italics supplied.] See also Mr. Lustig's statement (quoted *supra* at p. 23), that maintenance and cure afford adequate protection when a seamen's "injuries are minor and not of a totally disabling kind."

In a brief submitted in connection with the same hearings, Harry Lundeberg, representing the Sailors Union of the Pacific and the Seafarers International Union of North America, said (Hearings, p. 131): "Under the general maritime law now in effect the seamen are entitled to what is known as maintenance and cure. By this it is

being so well settled by judicial decisions (*supra*, pp. 12–15), Congress must be presumed to have had this settled rule in mind during the consideration of proposed changes in the maritime law. Cf. *United States* v. *Hill*, 248 U. S. 420, 424. The failure of Congress to make any change in the rule clearly constituted an implied approval and adoption of the doctrine consistently stated in the earlier court decisions. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 428. Cf. *Shapiro* v. *United States*, 335 U. S. 1, 16; *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14; *Missouri* v. *Ross*, 299 U. S. 72, 75; *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320, 336.

4. In sum, petitioner's contention that maintenance and cure, one aspect of the composite remedy available to seamen in personal injury matters, should now be expanded to embrace lifetime compensation not related to medical cure and based on liability without fault, is a request that this Court give virtually the full equivalent of the general damages which petitioner was unable to recover under the Jones Act. Certainly, it is a request for at least the equivalent of the full permanent disability benefits to which seamen

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meant that if a seaman becomes ill or is injured in the service of his ship, he can obtain medical service including hospitalization. In addition a seaman is entitled to recover maintenance while outside of the hospital *until his physical condition becomes fixed.* * * *" [Italics supplied.]

would be entitled under a complete statutory workmen's compensation system, which Congress has consistently refused to adopt. The contention is without support in the decided cases. It is in square conflict with Article 4 of the Shipowners' Liability Convention. And it seeks action by this Court which, we submit, would clearly run counter to the position taken by Congress in the same field.

II

A LUMP SUM AWARD AS FUTURE MAINTENANCE AND CURE FOR LIFE IS IMPROPER IN ANY EVENT

Even assuming *arguendo* that petitioner is correct in his contention that he is entitled to maintenance and cure for life, it does not follow that he is entitled to recover all such future maintenance and cure as a lump sum award in this proceeding. Whatever doubts there may be as to the interpretation of certain expressions in other portions of the *Calmar* opinion, this Court there held without qualification that "the award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision." *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 530.[14] The measure of the seaman's recovery

[14] It should be noted that the Court expressly limited its *caveat* concerning "incapacity * * * caused by the employment" (*supra*, p. 15) to the question of the duration of the duty to provide maintenance and cure in the case of a chronic illness. 303 U. S. at 530.

in each case was said to be "the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained." 303 U. S. at 531–532. Measured by this standard, petitioner has received all to which he is entitled in this proceeding.

The rationale of the *Calmar* decision is equally applicable to the case at bar. In that case, the lump sum award to cover the cost of maintenance and cure for life was reversed by this Court on three grounds: because (1) the amount and character of the future medical care required cannot be measured by mortality tables; (2) in the marine hospital service the seaman may be treated without expense or in some cases at minimum expense; and (3) the necessity of safeguarding the seaman in case of illness against the consequences of his own improvidence is not met by the payment of a lump sum to cover expenses for medical care during life. 303 U. S. at 530–531. It is impossible now to calculate the cost of whatever medical treatment petitioner may require in the future and there is no reason to believe that such medical care cannot be had through the marine hospital service. Moreover, the necessity of safeguarding the seaman against the consequences

of his own improvidence has not been exaggerated. The experience of the United States Employees' Compensation Commission (now the Bureau of Employees' Compensation), in administering the Longshoremen's and Harbor Workers' Compensation Act, has demonstrated that in 85% of the cases in which the Commission permitted a lump settlement, the settlement ultimately proved to be much less beneficial to the claimant that a weekly payment would have been. See testimony of Commissioner John J. Keegan, Hearings before a Subcommittee of the Senate Committee on Commerce, 76th Cong., 3rd sess., on H. R. 6881, p. 297. Such unfavorable results in selected cases investigated and approved by experienced personnel confirms the wisdom of this Court's disapproval of lump sum awards to seamen as future maintenance and cure.

The Government does not contend that petitioner is necessarily barred for all time from any further recovery of maintenance and cure by the finding here that he has received the maximum cure that medical treatment and surgical aid may accomplish. That finding obviously must be limited to the record here presented. The decree of the district court deals with petitioner's right to maintenance and cure only as of the time of the trial (R. 35). If at any time in the future petitioner can establish that in some way, as through an advance in medical or surgical science, he has

received further treatment of a curative nature, he may be entitled to recover in a new proceeding the amount expended for such treatment and for maintenance during the treatment. Cf. *Tol* v. *United States,* 166 F. 2d 775, 778 (C. A. 9); *Rey* v. *Colonial Nav. Co.,* 116 F. 2d 580, 583 (C. A. 2); *Moyle* v. *National Petroleum Transport Corporation,* 150 F. 2d 840, 842 (C. A. 2). And even if petitioner is thought entitled to recover for possible future medical care merely alleviating his headaches and convulsions (R. 33, 43), he has no present right to such an award. Whatever may be the duration of petitioner's right to maintenance and cure, a recovery therefor is improper without proof of expenditures or liability incurred. *Johnson* v. *United States,* 333 U. S. 46, 50; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 531; *Robinson* v. *Swayne & Hoyt,* 33 F. Supp. 93 (S. D. Cal.). We submit, therefore, that regardless of whether this Court holds that petitioner's right to mainfenance and cure extends beyond the time when he is as completely cured as he ever can be, the judgment here includes everything which he is entitled to recover in this proceeding, and any further recovery by him must await the bringing of a new proceeding after further liability, if any, has accrued.

III

PETITIONER IS NOT ENTITLED TO WAGES BEYOND THE END OF THE VOYAGE

Petitioner did not sign on as a part of the original crew of the *Haviland* when she began her voyage at Philadelphia, but instead signed on that vessel at Naples, Italy, on December 16, 1943 (R. 26–27). The *Haviland's* articles described the voyage as "from the Port of Philadelphia, to a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof * * * and back to a final port of discharge in the United States, for a term of time not exceeding 12 (twelve) calendar months" (Petitioner's Ex. 3). This voyage was completed at New York on March 28, 1944 (R. 40). Both courts below held that petitioner was not entitled to wages after that date (R. 33, 40).

Petitioner contends that under these articles his right to wages extended for twelve months from December 16, 1943, the date he joined the vessel, since he was under "a legal obligation to serve for twelve months, if required by the respondents" (Pet. 19). The language of the articles shows plainly, however, that petitioner's legal obligation to serve did not extend beyond the

termination of the voyage by the return of the ship "to a final port of discharge in the United States." Certainly none of the original crew would have violated his contract by quitting the ship after the termination of its voyage at New York on March 28, 1944. *The Edwin,* 23 Fed. 255 (S. D. N. Y.). The fact that petitioner joined the ship long after the articles were first opened, when the voyage was about half completed, does not mean that his right to wages is different from that of the seamen who signed on at the start of the voyage. *Gardner* v. *The New Jersey,* Fed. Cas. No. 5233 (D. Pa.).

Petitioner asserts that the word "voyage" is not used in the articles and contends that the court below erred in deciding this case as though it were (Pet. 17). This contention, however, does not take into account all of the provisions of the articles. The *Haviland's* articles were prepared on a standard printed form, and the language under construction was inserted in that portion of the printed form as to which the following instruction was given in a footnote (Petitioner's Ex. 3):

> Here the nature of the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.

The language used in completing this portion of the printed form was required by this instruction to be a *voyage description*. Considered as such, the fact that the term "voyage" was not included therein is without significance.

It should be noted that the articles which are under consideration here are not unique in form. R. S. 4511, as amended, 46 U. S. C. 564, (*infra*, p. 37), requires that all shipping articles state the nature and, as far as practicable, the duration of the intended voyage, and the port at which it is to terminate. During the war, it was undesirable to disclose the precise voyage on which a ship was preparing to set out and, under the authority of emergency war powers, the Secretary of the Navy waived compliance with this requirement of R. S. 4511, and prescribed a more indefinite form of "description of voyages" to be used. See Appendix, *infra*, pp. 38–39. The articles of the S. S. *James E. Haviland* followed the prescribed form. They were, therefore, in the same form as were the articles for every ship which left a port of the United States during the time that this order of the Secretary of the Navy was in effect. According to petitioner's contention, every seaman who shipped under these articles bound himself to serve a specified number of months, rather than for a voyage. This construction of the articles is contrary to the immemorial practice of seamen, and is, we submit, obviously erroneous.

As a practical matter, petitioner fails to recognize the distinction between articles for a foreign voyage and those used in the coastwise trades. Since coastwise voyages are comparatively short, the articles are frequently written to cover one or more voyages, for a term not to exceed a specified number of months, commonly with the right in either party to terminate on notice at the end of any voyage. Where a seaman employed under such articles is injured, the ship owner is not permitted to take an unconscionable advantage of him by terminating his employment at the end of the next voyage, but the employment is considered as continuing for the entire term of the articles. *Jones* v. *Waterman S. S. Corporation,* 155 F. 2d 992, 996 (C. A. 3); *Enochasson* v. *Freeport Sulphur Co.,* 7 F. 2d 674 (S. D. Tex.); *McCarron* v. *Dominion Atlantic Ry. Co.,* 134 Fed. 762 (D. Mass.). On the other hand, foreign articles normally cover only a single voyage to be terminated at a final port of discharge, the maximum time limit for the voyage being inserted for the protection of the seamen. Under foreign articles, the term of employment is therefore the single voyage, ending at the final port of discharge, and not the period of time provided as its maximum limit. *The Thomas Tracy,* 24 F. 2d, 372, 374 (C. A. 2); *The Ipswich,* 46 F. 2d 136, 138 (D. Md.); *Pell* v. *American West-African Line, Inc.,* 1939 A. M. C. 346 (S. D. N. Y.); *The*

Catalonia, 236 Fed. 554 (E. D. Va.); *The Falls of Keltie*, 114 Fed. 357, 359 (D. Wash.). See *The Mermaid*, 115 Fed. 13 (C. A. 9). This is in keeping with the traditional reluctance of seamen to bind themselves to contracts for stated periods of time, and their preference to be through with a vessel when a long voyage ends.

R. S. 4517, 46 U. S. C. 570, and Section 19 of the Act of June 26, 1884, 23 Stat. 58, 46 U. S. C. 572, cited by petitioner (Pet. 17), do not support his contentions. There is nothing in this record to show that petitioner was not engaged in the presence of the proper official as required by the statutes, or that petitioner's rights have been prejudiced in any way by any failure to comply with their provisions. The meaning of the term "final port of discharge" as used in shipping articles is well settled. It means that port at which the vessel is completely relieved of her cargo and thus becomes ready for another venture. *The Larimer*, 174 Fed. 429 (E. D. Pa.); *Schermacher* v. *Yates*, 57 Fed. 668 (E. D. N. Y.); *Hellevik* v. *American Sugar Transit Corp.*, 261 App. Div. 591, 594, 595, 26 N. Y. S. 2d 724. This being true, we submit that there was no ambiguity in the articles, and that the court below was clearly correct in holding that petitioner's term of employment ended on March 28, 1944, with the termination of the voyage of the *Haviland* at New York.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

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APPENDIX

Statute and Regulation Involved

1. R. S. 4511 as amended, 46 U. S. C. 564, provides in pertinent part:

> The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West Indian Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:
>
> First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.
>
> * * * * *

2. The Secretary of the Navy's order of March 6, 1942, waiving compliance with certain of the provisions of R. S. 4511 as amended, 46 C. F. R.

(1943 Supp), Appendix A, p. 2080, 7 F. R. 2477, provides:

DESCRIPTION OF VOYAGE IN SHIPPING ARTICLES

By virtue of the authority vested in me by the provisions of Executive Order No. 8976, dated December 12, 1941 and Executive Order No. 9083, dated February 28, 1942 (3 CFR Cum. Supp.), I hereby waive compliance with the provisions of section 4511 R. S. as amended (46 U. S. C. 564), and section 2 of the act of June 19, 1886, as amended (46 U. S. C. 563), to the extent hereinafter set forth:

(1) So much of section 4511 R. S., as amended, and section 2 of the act of June 19, 1886, as amended, as requires shipping articles to contain, in writing or in print, particulars as to the nature of the intended voyage or engagement is waived: *Provided*, That,

(a) The description of voyages on articles of agreement signed covering the departure of vessels of all categories from United States ports shall read:

To a point in the [1] Ocean to the [2] of [3] and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or agency, thereof,

[1] Name of ocean.
[2] Westward, eastward, southward, or northward.
[3] Name of port (New York, San Francisco, etc.).

and back to a final port of discharge [4] in the United States [4] for a term of time not exceeding ———— calendar months.

[4] Here may be inserted, if desired, such stipulations as: "And/or first loading port and/or bunkering port, and the locality where the voyage is to terminate."

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